Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example

Ammann, Odile

Abstract: In Domestic Courts and the Interpretation of International Law, Odile Ammann examines how domestic judges do and must interpret international law. She analyzes their interpretative methodology and the predictability, clarity, and consistency of their reasoning. Highlighting the main gaps in contemporary international legal scholarship regarding international law in domestic courts, Ammann offers a fresh and thorough theoretical reflection on this topic. Based on a detailed study of the judicial practice, she shows how courts' interpretative method and reasoning can be further improved. She also argues that interpretative methods must be taken more seriously in international law. While she primarily uses the Swiss example to illustrate her claims, the basic tenets of her analysis apply to any domestic legal context.

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Domestic Courts and the Interpretation of International Law

Methods and Reasoning Based on the Swiss Example

By

Odile Ammann

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Contents

Acknowledgments

I submitted this work as a doctoral thesis to the Faculty of Law of the University of Fribourg on 4 July 2017. The viva took place on 18 December 2017, the day on which the Faculty of Law accepted this thesis. Subsequent developments, including relevant case law and scholarship, have been taken into account up to June 2019.

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Zurich, June 2019

Abbreviations

AALCO	Asian-African Legal Consultative Organization
Aarhus Convention	Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters of 25 June 1998 (SR 0.814.07)
AG-BS	Appellationsgericht des Kantons Basel-Stadt (Court of Appeals of the canton of Basel-Stadt)
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (SR 0.518.522)
App	Application
ARSIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
art.	article(s)
BDP	Bürgerlich-Demokratische Partei (Conservative Democratic Party)
BGE	Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts (official compendium of the decisions of the Swiss Federal Tribunal)
BGer	Bundesgericht (Swiss Federal Tribunal)
BIS	Bank for International Settlements
bk	book
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (decisions of the German Federal Constitutional Court)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979 (SR 0.108)
CERD	Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (SR 0.104)
CERN	European Organization for Nuclear Research (formerly: Conseil européen pour la recherche nucléaire)
CESCR	UN Committee on Economic, Social and Cultural Rights
ch	chapter
CIL	customary international law
CJEU	Court of Justice of the European Union
CJ-GE	Cour de justice du canton de Genève (Supreme Court of the canton of Geneva)

CLS	Critical Legal Studies
Cst.	Constitution of the Swiss Confederation of 18 April 1999 (SR 101)
Cst-BE	Constitution of the canton of Bern of 6 June 1993 (SR 131.212)
Cst-BS	Constitution of the canton of Basel-Stadt of 23 March 2005 (SR 131.222.1)
Cst-FR	Constitution of the canton of Fribourg of 16 May 2004 (SR 131.219)
Cst-GE	Constitution of the Republic and canton of Geneva of 14 October 2012 (SR 131.234)
Cst-TI	Constitution of the canton of Ticino of 14 December 1997 (SR 131.229)
Cst-ZH	Constitution of the canton of Zurich of 27 February 2005 (SR 131.211)
CVP	Christlichdemokratische Volkspartei (Christian Democratic Party)
DETEC	Swiss Federal Department of the Environment, Transport, Energy, and Communications
DIL	Swiss Directorate of International Law
DMCC	Decisions of the Military Court of Cassation
DTA	Double Taxation Agreement
eg	*exempli gratia*
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ed(s)	editor(s)
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
et al.	*et alii/aliae/alia*
etc.	*et cetera*
EU	European Union
f/ff	and following
FA-CFLFG	Federal Act on the Compilations of Federal Legislation and the Federal Gazette of 18 June 2004 (SR 170.512)
FA-CPP	Federal Act on Civil Peace Promotion and the Strengthening of Human Rights of 19 December 2003 (SR 193.9)
FA-FA	Federal Act on the Federal Assembly of 13 December 2002 (SR 171.10)
FA-FAP	Federal Act on Federal Administrative Procedure of 20 December 1968 (SR 172.021)
FA-FN	Federal Act on Foreign Nationals and Integration of 16 December 2005 (SR 142.20)
FA-FPC	Federal Act on the Federal Patent Court of 20 March 2009 (SR 173.41)
FA-NL	Federal Act on the National Languages and Understanding Between the Linguistic Communities of 5 October 2007 (SR 441.1)
FA-OFCA	Federal Act on the Organization of the Federal Criminal Authorities of 19 March 2010 (SR 173.71)

FA-SFAC	Federal Act on the Federal Administrative Court of 17 June 2005 (SR 173.32)
FA-SFT	Federal Act on the Swiss Federal Tribunal of 17 June 2005 (SR 173.110)
FDFA	Swiss Federal Department of Foreign Affairs
FDP	Freisinnig-Demokratische Partei (Free Democratic Party)
FG	Bundesblatt (Federal Gazette)
FTA	Free Trade Agreement
GRECO	Group of States Against Corruption
IACtHR	Inter-American Court of Human Rights
ibid	*ibidem*
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court of 17 July 1998 (SR 0.312.1)
ICCPR	International Covenant on Civil and Political Rights of 16 December 1966 (SR 0.103.2)
ICESCR	International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (SR 0.103.1)
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice of 26 June 1945 (SR 0.193.501)
ICL	international criminal law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ie	*id est*
IHL	international humanitarian law
IHRL	international human rights law
ILA	International Law Association
ILC	International Law Commission
ILC Statute	Statute of the International Law Commission of 21 November 1947
ILDC	Oxford Reports on International Law in Domestic Courts
ILO	International Labor Organization
IO	international organization
ISO	International Organization for Standardization
ITLOS	International Tribunal for the Law of the Sea
MCC	Military Court of Cassation
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
No	number
OECD	Organization for Economic Co-operation and Development
OGer-BE	Obergericht des Kantons Bern (High Court of the canton of Bern)

OGer-ZH	Obergericht des Kantons Zürich (High Court of the canton of Zurich)
OSCE	Organization for Security and Co-operation in Europe
p.	page(s)
para	paragraph(s)
PCIJ	Permanent Court of International Justice
PKK	Partiya Karkerên Kurdistanê (Kurdistan Workers' Party)
SCC	Swiss Civil Code of 10 December 1907 (SR 210)
SCrimC	Swiss Criminal Code of 21 December 1937 (SR 311.0)
SFAC	Swiss Federal Administrative Court
SFCC	Swiss Federal Criminal Court
SFDI	Société française de droit international
SMCC	Swiss Military Criminal Code of 13 June 1927 (SR 321.0)
SR	Systematische Sammlung des Bundesrechts (Systematic Compilation of Federal Legislation)
SVP	Schweizerische Volkspartei (Swiss People's Party)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights of 15 April 1994 (SR 0.632.20, Annex 1C)
TWAIL	Third World Approaches to International Law
UBS	Union de banques suisses
UDHR	Universal Declaration of Human Rights of 10 December 1948
UK	United Kingdom
UN	United Nations
UNCSI	UN Convention on the Jurisdictional Immunities of States and Their Property of 2 December 2004
UNHCR	UN High Commissioner for Refugees
US	United States
v.	*versus*
VCDR	Vienna Convention on Diplomatic Relations of 18 April 1961 (SR 0.191.01)
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969 (SR 0.111)
Vol	volume(s)
VPB	Verwaltungspraxis der Bundesbehörden (Administrative Practice of the Federal Authorities)
VwGer-BE	Verwaltungsgericht des Kantons Bern (Administrative Court of the canton of Bern)
VwGer-SG	Verwaltungsgericht des Kantons St. Gallen (Administrative Court of the canton of St. Gallen)
VwGer-ZH	Verwaltungsgericht des Kantons Zürich (Administrative Court of the canton of Zurich)
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Introduction

> [One] cannot but admire the striking example of democracy which this small multi-racial and multilingual nation has set for the world. Nor can [one] fail to give her credit for the loyalty with which she has cooperated with other nations in the past. Not only have various international bureaus been located at Bern, but Switzerland continued to give hospitality to the League of Nations when potentially hostile armies were massed on all her frontiers. The whole world expects Switzerland to hew the line of legal propriety, to chart her course with meticulous regard for her obligations under international law.[1]

1 The Subject and Basic Claims of This Book

The above quote, written by Manley O Hudson, dates back to 1947. Today, more than seven decades later, Hudson's optimistic remarks about Switzerland's expected compliance with international law leave us wondering how the practice of the Swiss authorities has evolved. Has Switzerland indeed been 'chart[ing] her course with meticulous regard for her obligations under international law'?[2]

In this book, I examine how Swiss courts, but also domestic courts in general, do and must interpret[3] international law. For this purpose, I analyze whether they comply with what international law requires from States when they interpret their international legal obligations. I also assess whether Swiss courts' interpretations are predictable, clear, and consistent. I then suggest how to improve this domestic judicial practice from these two perspectives.

The two basic claims guiding my study are the following. First, Switzerland and other States, when interpreting international law via their organs,

1 Manley O Hudson, 'Switzerland and the International Court of Justice' (1947) 41 American Journal of International Law 866, 867 f.

2 See ibid 868.

3 In Chapter 2 (*infra*), I discuss the variety of activities involved in this context.

including their courts, must abide by the interpretative methods required by international law. They must use these methods as guides in their interpretative process. Indeed, courts' adherence to the law's interpretative methods is a condition of the legality of their decisions. Second, courts, *qua* legal reasoners, must interpret the law as predictably, clearly, and consistently as possible. The predictability, clarity, and consistency of domestic courts' interpretations of international law matter because these virtues support legality. Said virtues also matter because they influence the extent to which domestic judgments constitute reliable and helpful means for ascertaining international law.

This two-pronged argument may seem to be a truism. Of course, judges must abide by the law when they interpret it. And of course, they must interpret it well. Why, then, state the obvious? Some readers, when flipping (or scrolling!) through the pages of this book, will likely think something along the lines of what US Supreme Court Justice Felix Frankfurter wrote about statutory interpretation:

> No matter how one states the problem of statutory construction, for me at least it does not carry its own answer. Though my business throughout most of my professional life has been with statutes, I come to you empty-handed. I bring no answers. I suspect the answers to the problems of an art are in its exercise. Not that one does not inherit, if one is capable of receiving it, the wisdom of the wise. But I confess unashamedly that I do not get much nourishment from books on statutory construction, and I say this after freshly reexamining them all, scores of them.[4]

Justice Frankfurter's statement about US statutory interpretation can be extrapolated to any analysis of interpretative methods. As I will argue, the basic methods of legal interpretation are the same across domestic legal orders and in international law, despite the differences that exist between domestic and international lawmaking.

In some respects, Frankfurter is undoubtedly right. One cannot master judicial interpretation only by reading the theoretical accounts of interpretation he alludes to. On the other hand, scholarly analyses of judicial interpretation are not comparable to books that teach us how to play the guitar. An argument as to how judicial interpretation must be conducted is an integral part

4 Felix Frankfurter, 'Some Reflections on the Reading of Statutes' (1947) 47 Columbia Law Review 527, 530.

of legal practice. It contributes to its justification and improvement. Moreover, the domestic (including the Swiss) case law shows that books on judicial interpretation are more urgently needed than we might think. Compliance with the law's interpretative methods and the virtues of predictability, clarity, and consistency is often unmet in practice, especially when it comes to international law.

Since 1954, the share of published rulings in which the Swiss Federal Tribunal mentions international law has more than tripled.[5] Analogous trends are witnessed in other jurisdictions. International law poses interpretative challenges for judges, due to its frequent vagueness and the stakes involved for States. However, as I will argue in more detail (*infra*, Chapter 5), these are not justifications for neglecting the interpretative methods of international law. Quite the contrary: given the indeterminacy of international law, the countermajoritarian features of judicial decision-making, and the risk that judges abuse their interpretative power, the practice of Swiss and other domestic judges cannot escape scrutiny. Judicial interpretations must, among other things, be evaluated based on whether they comply with the law's interpretative methods, and based on whether they are predictable, clear, and consistent.

While many other legal and moral principles apply to and constrain judicial interpretation, my primary focus in this book lies on States' international legal obligations and on the interpretative methods required by international law, as well as on the abovementioned three virtues of predictability, clarity, and consistency. I do not assess whether domestic courts reached the right interpretative conclusion, all things considered.

2 Structure and Approach

The structure of this book builds on Joseph Raz's statement that understanding the concept of interpretation requires delving into the three following questions: what is interpretation, why interpret, and how to interpret?[6] While I follow this triptych ('what?', 'why?', and 'how?'), I sometimes adjust Raz's

5 Odile Ammann, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (2018) 28 Swiss Review of International and European Law 489.

6 Joseph Raz, 'First Lecture: Even Judges Are Humans' (*Storrs Lectures: Between Authority and Morality*, 2003); Joseph Raz, 'Second Lecture: Theory of Interpretation – What Is Interpretation?' (*Storrs Lectures: Between Authority and Morality*, 2003); Joseph Raz, 'Third Lecture: Why Interpret? How to Interpret?' (*Storrs Lectures: Between Authority and Morality*, 2003).

questions to make them fit the needs of a legal, doctrinal analysis, as well as the international legal context.[7]

My endeavor, contrary to Raz's, is not that of a legal philosopher who stands outside the law. My aim is to start from the domestic (primarily Swiss) judicial practice of international law and to examine it *qua* law and from within, ie, from the perspective of a participant rather than from that of an observer. I intend to provide an overview of this practice, but also to evaluate it based on two criteria that I develop further below, and to formulate recommendations for its further improvement.

Part one, entitled 'What Is Interpretation?', lays out the foundations of the study. In Chapter 1, I introduce the issue at stake and explain its relevance. Chapter 2 is devoted to terminological and conceptual clarifications. In Chapter 3, I underscore features of the Swiss legal order that will help the reader understand some idiosyncrasies of the Swiss judicial practice of international law.

In the second part, entitled 'Why Interpret?', I elucidate what Joseph Raz calls the centrality of interpretation to legal practices. In Chapter 4, I clarify States' international legal obligations when it comes to applying and therefore interpreting international law domestically. In this chapter, I also identify the legal effect of domestic rulings in international law.

The third and last part of the book is devoted to the question 'How to interpret?' In Chapter 5, I prepare the ground for answering this query by showing why there are good reasons for requiring States to operate within a legal frame when they interpret international law. In Chapter 6, I discuss the components of this frame and the virtues and vices of different interpretative methods. The two last chapters dig into, and evaluate, the Swiss judicial practice pertaining to treaties (Chapter 7), customary international law (CIL), and general principles of international law (Chapter 8). These

7 What constitutes a doctrinal piece of scholarship is, of course, a scholarly debate of its own. Following Martha Minow, doctrinal scholarship can be described as scholarly work which aims to: 'a. Organize and reorganize case law into coherent elements, categories, and concepts; b. Acknowledge distinction between settled and emerging law; c. Identify difference between majority and "preferred" or "better" practice – ideally with some explanation for the criteria to be used'. See Martha Minow, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63 Journal of Legal Education 65, 65. On doctrinal scholarship, see also Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 Law Quarterly Review 632, 633 ff; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83; Allan Beever and Charles Rickett, 'Review Article: Interpretive Theory and the Academic Lawyer' (2005) 68 Modern Law Review 320; Stephen A Smith, 'Taking Law Seriously' (2000) 50 University of Toronto Law Journal 241.

'practical' chapters also contain observations regarding the case law of domestic courts in general.

In the conclusion, I reiterate my argument and findings. I also suggest how to improve the Swiss practice, and that of domestic courts more generally.

The cases studied are rulings of the Swiss Federal Tribunal and of other selected federal, cantonal, and military Swiss courts. I also rely on international and Swiss legal scholarship and legal theory and, occasionally, on the practice of foreign and international courts. When engaging with the case law in other States, my aim is not to undertake a full-fledged project of 'comparative international law'.[8] Rather, it consists in putting the Swiss practice into perspective. Understanding and evaluating this practice requires analyzing it within its broader context, and not in clinical isolation. On the other hand, I hope that the 'Swiss' perspectives highlighted in this book will feed into the work of international legal scholars and practitioners, including into the work of researchers who are contributing to the growing[9] field of comparative international law.

The literature I use ranges across many theoretical approaches to law, from legal positivism to legal realism and CLS. Many strands of legal scholarship have engaged with the topic of judicial interpretation, and they have explained, criticized, or sought to justify some of its aspects. My objective is to identify how these approaches can contribute to a better understanding of (and, hence, a more informed approach to) how domestic courts must interpret international law. Some of these theories must be approached with care, as they do not necessarily fit the international interpretive context of the Swiss legal order and the evaluative criteria I adopt in this study.

I argue that interpretation should be pluralistic, ie, that an interpretative conclusion should result from the application of a plurality of interpretative methods (*infra*, Chapter 6, 2.5). I do not defend a specific normative interpretative theory, such as textualism or purposivism (on the relationship between such theories and the law's interpretative methods, see *infra*, Chapter 2, 5.1). Every method has its virtues and its limitations (*infra*, Chapter 6, section 2). Even judges who, like the late Antonin Scalia, wholeheartedly endorse a specific normative interpretative theory and are explicit about it, do not adopt a perfectly consistent approach across cases. Even they tend to invoke different interpretative arguments depending on the result they seek to reach. Instead of arguing that a specific method should be given more weight, I highlight why

8 Eg Anthea Roberts, Paul Stephan, Pierre-Hughes Verdier, and Mila Versteeg (eds), *Comparative International Law* (Oxford University Press 2018).

9 Anthea Roberts, *Is International Law International?* (Oxford University Press 2017) 289.

respecting the law's methods is important in general, and perhaps especially in international law (*infra*, Chapter 5).

By focusing on a jurisdiction and polity committed to an idiosyncratic cluster of values, my goal is not to endorse and to defend a given political philosophy. Switzerland, a liberal, constitutional, semi-direct democracy committed to the rule of law (*infra*, Chapter 3, section 3), serves as a starting point to critically examine and articulate the methods *any* State must follow to interpret international law via its courts.

Swiss readers might wonder why this book is not written in one of the four Swiss national languages.[10] If Swiss lawyers, and especially Swiss judges, are my intended audience, writing in a Swiss national language is arguably more appropriate. Facing a difficult choice which many authors must confront,[11] and with both an international and a domestic audience in mind, I settled on English based on various considerations. First, my study highlights States' international legal obligations. It hence concerns other jurisdictions as well, not only Switzerland. Second, this book engages with, and seeks to contribute to, contemporary international legal scholarship on international law in domestic courts, which is predominantly (though not only) written in English. Third, due to the globalization of legal research, scholarly analyses of the Swiss practice of international law are increasingly written in English.[12] One must be critical of this dominance of English, however.[13] Partly because the great bulk of international legal scholarship published today is written in English,[14] domestic rulings available in this language enjoy disproportionate attention.[15]

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10 Ie, German, French, Italian, and Romansh.

11 Roberts, *Is International Law International?* (n 9) 263.

12 Eg Thore Neumann and Anne Peters, 'Switzerland' in August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press 2013); Andreas R Ziegler, 'The Application of WTO Law in Switzerland' in Claudio Dordi (ed), *The Absence of Direct Effect of WTO* [sic] *in the EC and in Other Countries* (Giappichelli 2010); Daniela Thurnherr, 'The Reception Process in Austria and Switzerland' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008).

13 For a recent critique, see Christian Tomuschat, 'The (Hegemonic?) Role of the English Language' (2017) 86 Nordic Journal of International Law 196.

14 John Louth, 'Guest Post: How Many International Law Books Are Published in a Year?' (*Opinio Juris*, 2015) <opiniojuris.org/2015/04/08/guest-post-how-many-international-law-books-are-published-in-a-year>; Michael Wood, 'Editorial Comment – The Present Position Within the ILC on the Topic "Identification of Customary International Law": In Partial Response to Sienho Yee, Report on the ILC Project on "Identification of Customary International Law"' (2016) 15 Chinese Journal of International Law 3, 13.

15 ILA, '(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With

Moreover, the fact that resources like the Oxford Reports on International Law in Domestic Courts (ILDC), the online database of domestic rulings on international law provided by Oxford University Press, are only available in English, might hinder some domestic judges from using them.

3 The Benchmarks of Legality and Quality

Finally, it is essential to clarify the benchmark I use to evaluate the judicial practice. As previously mentioned, I propose to conduct this assessment based on two criteria: *legality* (or lawfulness), ie, whether a judicial interpretation has been reached in conformity with the law's interpretative methods; and what I call *quality*, ie, the extent to which a judicial interpretation is predictable, clear, and consistent. In the following, I briefly explain what the two criteria consist in.

The criterion of legality allows me to examine whether a judicial decision has been reached in conformity with what legal interpretative methods require. A judicial interpretation that violates the legal frame that governs it (ie, the law's interpretative methods) disregards the law. Given judges' duty to abide by the law, and given States' duty to respect international law, such an interpretation fails from the perspective of legality. Observing the law's interpretative methods demands that no method be disregarded. This requirement applies even if there will often be tensions between different methods, and even if in some cases, some methods will not seem helpful or important compared to others. Moreover, these methods must be taken seriously: instead of merely paying lip service to them, courts must genuinely seek to identify the features of the law to which these methods point. Importantly, however, compliance with the applicable interpretative methods does not prevent different courts from reaching different, incompatible interpretative outcomes.

The second criterion I use to evaluate a judicial interpretation is its quality, ie, the predictability, clarity, and consistency of the legal reasoning that underpins it. When referring to quality, I will not examine whether a judicial interpretation is legitimate (ie, whether the judge has the moral right to rule over the law's subjects), or whether it is justified (ie, whether it is morally

International Law' (2016) 7 <www.ila-hq.org/index.php/study-groups>; Cecilia M Bailliet, 'National Case Law as a Generator of International Refugee Law: Rectifying an Imbalance Within the UNHCR Guidelines on International Protection' in Mary E Footer, August Reinisch, and Christina Binder (eds), *International Law and … Select Proceedings of the European Society of International Law, Vol 5, 2014* (Hart Publishing 2016).

defensible).[16] The concept of legitimacy is highly complex and controversial, and legal philosophers have discussed it extensively. In this book, I will not provide a general theory of international justice, of the role the State ought to play in international law, nor will I provide a general theory of the legitimacy of international law, of Swiss law, or of Swiss courts' interpretations thereof. This should not detract from the fact that I will be defending claims that can have implications for – and would be elements of – such theories, and that I will be defending claims as to how judges must (from the perspective of international law) and should (from the perspective of high-quality legal reasoning) decide cases. Moreover, I will be relying on concepts (such as good reasoning) that are used in legal practice, but that also exist outside the law, eg in moral reasoning.

Instead of providing an analytical account of legitimacy, I will evaluate judicial interpretations based on whether they are predictable, clear, and consistent. These three characteristics are linked to the legal and moral principle of the rule of law, of which I do not provide a theory here, but which I believe the practice of international law should promote, and to which legal practice aspires.[17] These three virtues are congruent with the principles Joseph Raz derives from the rule of law, and which specifically pertain to courts and their decisions.[18]

The virtues of predictability, clarity, and consistency go hand in hand.[19] A predictable interpretation must be clear and consistent with other interpretations, and it is difficult to imagine how consistency could be achieved without clarity. Nonetheless, the three virtues may also pull in opposite directions. Their precise weights and implications might lead to disagreements, and the terminology used to describe them fluctuates. However, their basic characteristics are well established in legal practice.

First, predictability (which, in this book, is used as a synonym for stability, certainty, constancy, and foreseeability) ensures that a judicial interpretation can, with a minimal degree of certainty, be anticipated by the law's subjects.[20]

16 Alan John Simmons, 'Justification and Legitimacy' (1999) 109 Ethics 739. Note that I am referring to normative legitimacy, and not to sociological legitimacy. However, while sociological legitimacy is not the focus of this study, it is likely that the legality and quality of courts' reasoning contribute to the sociological legitimacy of their decisions.

17 On this complex topic, see Denise Wohlwend, *The International Rule of Law: Notion, Scope, and Subjects* (Edward Elgar, forthcoming).

18 See the principles 1 and 2 highlighted by Joseph Raz, ie, the requirement that laws be prospective, open, clear, and relatively stable: Joseph Raz, 'The Rule of Law and Its Virtue', *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 214 f.

19 Eg BGE 141 V 509, at 7.1.1.

20 Lon Fuller, *The Morality of Law* (Yale University Press 1964) 79 ff.

Predictability does not mean that courts cannot overrule previous decisions in exceptional cases. However, the law's subjects must be able to expect such changes to happen, and departures from past cases must be carefully justified.[21] By contrast, arbitrary, whimsical interpretations prevent the law's subjects from adjusting their behavior to what the law requires. They make it impossible to predict[22] how law-applying bodies will determine the law.

Second, the clarity[23] (or intelligibility, transparency) of judicial interpretations makes them understandable. Contrary to opacity, clarity enables the law's subjects to grasp what the law requires, and to adjust their behavior accordingly.

Third, a consistent (or coherent) judicial interpretation is devoid of contradictions.[24] It lacks both internal contradictions, and contradictions with the reasoning of the court in previous cases. While internal consistency allows the law's subjects to make sense of judicial interpretations and to anticipate them, consistency with previous cases chiefly aims at ensuring that these subjects will be treated equally.

The value attached to predictable, clear, and consistent decisions, and the expectation that judicial interpretations will honor these virtues, are reflected in domestic and international legal practice.[25]

As regards predictability, under Swiss law, for instance, laws must be such that their subjects are able to at least roughly anticipate the legal consequences of their actions.[26] Predictability (or certainty) is also a principle of English law, for example.[27] In international law, predictability is reflected in the principle of non-retroactivity.[28] The importance of predictability can be derived

21 On this problématique, see ibid 56 f; Pascal Pichonnaz, 'L'effet rétroactif du changement de jurisprudence : quelques réflexions à l'aune du pluralisme méthodologique' in Alexandra Rumo-Jungo and others (eds), *Une empreinte sur le Code civil : Mélanges en l'honneur de Paul-Henri Steinauer* (Schulthess 2013).

22 Some authors argue that the task of a lawyer consists in predicting how courts will adjudicate a dispute. See Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457.

23 Fuller (n 20) 63 ff.

24 On contradictions in the law, see ibid 65 ff.

25 Geranne Lautenbach notes the difficulty of codifying these requirements: Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford University Press 2013) 39.

26 Eg in criminal law: BGE 141 IV 279, at 1.3.3. Regarding the restriction of fundamental rights, see SFAC, judgment A-4941/2014 of 9 November 2016, at 10.

27 Jonathan Mance, 'Should the Law Be Certain?' (*Oxford Shrieval Lecture*, 2011) <www.supremecourt.uk/docs/speech_111011.pdf>.

28 Art. 7(1) ECHR; art. 15(1) ICCPR.

from the fact that under domestic[29] and international[30] law, courts must decide cases according to law, independently, and impartially. The virtue of predicable interpretations is stressed in scholarship as well.

The value attached to clarity is expressed by the constitutional right to be given reasons for official decisions.[31] It is also linked to the fact that under both domestic[32] and international[33] law, judicial proceedings must, in principle, be public. In scholarship, judgments are frowned upon if the underlying reasoning is not transparent and intelligible.

Consistency is pursued in legal practice as well. Courts, when providing reasons for their interpretations, strive to show that these interpretations are required by the law, and that they are the result of sound reasoning. If judges were to do otherwise, their judgments would attract criticism, as lawyers and scholars often challenge court rulings based on their lack of consistency. Consistency is also reflected in the doctrine of *stare decisis* that exists in many jurisdictions, and in norms mandating stability across cases even in the absence of such a doctrine.[34] It is also linked to the right to equality, which is protected by domestic constitutional law[35] and by international law.[36]

As the previous remarks show, evaluating, criticizing, and seeking to improve the quality of legal reasoning based on its predictability, clarity, and consistency is not only a requirement of the rule of law: it is also reflected in legal practice and scholarship.[37]

I will not seek to prove that predictability, clarity, and consistency are good, legitimate features, nor will I demonstrate that they are required by the rule of law in international relations. Such a project is, as previously stated, not what I am pursuing in this study. For my purposes, I will simply assume that if a court interprets a given provision and concludes that its meaning is X, it should be able to offer a predictable, clear, and consistent explanation of this result. If the court does not do so, I will assume that its interpretation fails from the perspective of the quality of legal reasoning and, hence, that it carries little

29 Art. 5(1) (adherence to law) and 30(1) Cst. (independence and impartiality).
30 Art. 6(1) ECHR; art. 14(1) ICCPR (independence and impartiality).
31 Art. 29(2) Cst.
32 Art. 30(3) Cst.
33 Art. 6(1) ECHR; art. 14(1) ICCPR.
34 Art. 23 FA-SFT.
35 Art. 8 and 29(1) Cst.
36 Art. 14 ECHR; art. 2(1), 14(1), and 26 ICCPR.
37 For an example, see Noora Arajärvi, 'The Requisite Rigour in the Identification of Customary International Law: A Look at the Reports of the Special Rapporteur of the International Law Commission' (2017) 19 International Community Law Review 9.

weight for the determination of the sources of international law (art. 38(1)(a)–(c) ICJ Statute) and *qua* auxiliary means (art. 38(1)(d) ICJ Statute).

Indeed, assessing the quality of a legal interpretation helps in determining the weight this interpretation should be given with respect to the meaning of the *interpretandum*.[38] A judicial interpretation that is not transparent, that contains a *non sequitur*, or that otherwise fails to demonstrate why the legal meaning of the interpretative object is X, is of poor quality from the perspective of legal practice, both domestic and international. This is the case even if this interpretation is otherwise in conformity with legal interpretative methods. The quality of judicial decisions also influences the extent to which these decisions can (and should, from the perspective of the rule of law) contribute to the ascertainment of international law. (On the status of domestic rulings in the sources of international law and *qua* auxiliary means, see *infra*, Chapter 4, section 3).

The two criteria of legality and quality will underpin my evaluation of the judicial practice throughout the present study. In emphasizing that domestic courts must respect legal interpretative methods, I will point to the first criterion, ie, legality or lawfulness. In stressing that they must reason in a predictable, clear, consistent way, I will point to the second criterion, namely to the quality of the court's reasoning. One could argue that these criteria (and especially the three virtues of judicial reasoning) are indeterminate. Yet as Aristotle notes, '[o]ur discussion will be adequate if it has as much clearness as the subject matter admits of, for precision is not to be sought for alike in all discussions, any more than in all the products of the crafts'.[39]

Legality and high-quality reasoning are closely related. Predictable, clear, and consistent reasoning facilitates the observance of interpretative methods. *Vice versa*, interpretative methods increase the degree of predictability, clarity, and consistency of judicial decision-making. Given the close links that exist between legality and quality, and as is common in legal scholarship, I will often mention them jointly.

I now turn to the first part of this study, entitled 'What Is Interpretation?'

38 As Scott Brewer notes regarding the law of evidence, 'we might fashion an analogue for the Socratic maxim "the unexamined life is not worth living": the unexamined evidentiary argument is not worth believing'. See Scott Brewer, 'Logocratic Method and the Analysis of Arguments in Evidence' (2011) 10 Law, Probability and Risk 175, 175.

39 Aristotle, 'Nicomachean Ethics' bk I ch 3 <classics.mit.edu/Aristotle/nicomachaen.1.i.html>. I am grateful to Timothy Endicott for bringing this passage to my attention.

PART 1

What Is Interpretation?

CHAPTER 1

The Interpretation of International Law by Domestic Courts – A Topic That Matters

> [T]he place of international law in municipal court cases amounts today to a quiet and often unnoticed revolution in the nature and content of international law.[40]

1 Introduction

Why should we care about how domestic courts must interpret international law? In this chapter, I provide an overview of the existing literature dealing with the interpretation of international law by domestic courts, both in Switzerland and in other jurisdictions (2). I explain the reasons that lead me to focus on Switzerland (3), courts (4), domestic courts (5), and international law (6). Finally, I clarify why it is worthwhile to examine the domestic practice from the angle of interpretative methods (7).

2 The State of the Literature

In 2014, the Swiss Federal Tribunal mentioned international law in 27.3% of its published decisions. By contrast, six decades earlier, in 1954, the Court cited international law in 8.5% of them. In other terms, the share of published cases containing a reference to international law has more than tripled in 60 years.[41]

The Swiss example is not an outlier. The interpretation of international law in domestic courts 'has become a regular occurrence, at least in certain states

40 Robert Y Jennings, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 International and Comparative Law Quarterly 1, 4.

41 Ammann, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (n 5).

and in certain fields'.[42] International law is invoked and applied in domestic courts across the globe, be it in liberal democracies[43] or in authoritarian regimes,[44] in former colonial powers[45] or in decolonized States.[46]

Mirroring this global trend, international law in domestic courts and domestic courts in international law are thriving fields in legal scholarship today. The myriad contributions published on the issue in recent years,[47] the launch of an online database of relevant domestic court cases in 2007,[48] and the creation of book series devoted to international law in domestic legal orders[49] are only a few examples of the interest contemporary international lawyers devote to this topic.

The issue itself is not new. International lawyers have been intrigued by domestic courts' interpretation of international law for decades.[50] 1905 saw the publication of a book by Dionisio Anzilotti entitled *Il diritto internazionale nei giudizi interni*.[51] In 1929, Hersch Lauterpacht published an article in which he presented domestic municipal decisions, including court decisions, as 'sources of international law'.[52] States have been compiling yearly digests

42 Georg Nolte, 'Introduction' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016) 1.

43 Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Alfred A Knopf 2015).

44 Congyan Cai, 'International Law in Chinese Courts During the Rise of China' (2016) 110 American Journal of International Law 269, 269.

45 See Tom Bingham's preface in Shaheed Fatima, *Using International Law in Domestic Courts* (Hart Publishing 2005) xi.

46 VH Hegde, 'Indian Courts and International Law' (2010) 23 Leiden Journal of International Law 53, 55.

47 Eg Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016); André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011).

48 Oxford Reports on International Law in Domestic Courts, <opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts>.

49 <global.oup.com/academic/content/series/i/international-law-in-domestic-legal-orders-ildo>.

50 Hersch Lauterpacht, 'Municipal Decisions as Sources of International Law' (1929) 10 British Year Book of International Law 65; Richard A Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse University Press 1964); Richard Lillich, 'The Proper Role of Domestic Courts in the International Legal Order' (1970) 11 Vanderbilt Journal of Transnational Law 9; Thomas M Franck and Gregory M Fox (eds), *International Law Decisions in National Courts* (Transnational Publishers, Inc 1996).

51 Dionisio Anzilotti, *Il diritto internazionale nei giudizi interni* (Zanichelli 1905).

52 Lauterpacht, 'Municipal Decisions as Sources of International Law' (n 50).

of their practice of international law for years,[53] and the International Law Reports have included domestic rulings since their inception in the late 1920s. The scope of international law, and especially of treaty law, has been steadily expanding ever since, making it difficult for domestic lawyers and judges to ignore its existence[54] and the fact that States must respect international law.

If States have the duty to respect international law, why is it necessary to examine how domestic courts, including Swiss courts, must interpret this body of law? I argue that a new study that builds on and seeks to guide the practice, and that complements scholarly efforts to date is needed for at least five reasons.

First, existing scholarship on domestic courts and international law primarily focuses on mapping the existing practice rather than on the normative (legal[55] and/or moral) principles that must or should guide it (2.1). Moreover, legal theorists and philosophers tend to neglect international law (2.2). Third, the place of domestic judicial decisions in the sources of international law is ambiguous (2.3). Fourth, scholars and courts often neglect that the fact that States must respect the interpretative methods of international law is a corollary of their international legal obligations (2.4). Finally, a comprehensive overview and evaluation of Swiss courts' practice of international law is missing (2.5).

2.1 *Descriptive Bias*

While there is no dearth of scholarly work on international law in domestic courts, this scholarship is predominantly '*descriptive* and of a sociological kind', as Samantha Besson puts it. Consequently, this work seldom addresses the normative (legal or moral) principles domestic courts must or should respect when interpreting international law.[56]

53 See the digest published annually in the Swiss Review of International and European Law, currently compiled by Lucius Caflisch. For another example out of many: Juan Santos Vara, Soledad R Sánchez-Taberneroy, and Daniel González Herrera, 'Crónica sobre la aplicación judicial del derecho internacional público en España (julio 2014 – junio 2015)' (2015) 29 Revista Electrónica de Estudios Internacionales.

54 See already *The Interpretation of Statutes* (Her Majesty's Stationery Office 1974) <www.lawcom.gov.uk/wp-content/uploads/2016/08/LC.-021-SC.-011-THE-INTERPRETATION-OF-STATUTES.pdf>.

55 As mentioned, this study focuses on *legal* principles.

56 Samantha Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' in Mary E Footer, August Reinisch, and Christina Binder (eds), *International Law and … Select Proceedings of the European Society of International Law, Vol 5, 2014* (Hart Publishing 2016) 45.

Scholars have pointed out that domestic courts, when they interpret international law, fulfill a domestic, but also an international 'function'.[57] They have underlined this 'duality',[58] typically via Georges Scelle's sociological (and often misspelt) concept of 'dédoublement fonctionnel'.[59] They have stressed that domestic rulings contribute to the formation of international law, and that domestic judges, by citing their own rulings (or, more generally, their own State's practice), can increase the influence of this domestic practice on international lawmaking.[60] Scholars and private organizations such as the ILA have 'mapped' the types of engagement of domestic courts with international law,[61] adopting a 'functional'[62] approach or other descriptive

57 Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 Loyola of Los Angeles International and Comparative Law Review 153.

58 ILA, 'Proposal for an ILA Study Group on the Principles on the Application of International Law by Domestic Courts' (2011) 1 <www.ila-hq.org/index.php/study-groups>. See also Janet Walker, 'The Role of Domestic Courts in the International Legal Order: A Tribute to Richard Falk' (2005) 11 ILSA Journal of International and Comparative Law 365.

59 Georges Scelle, 'Le phénomène juridique du dédoublement fonctionnel' in Walter Schätzel and Hans-Jürgen Schlochauer (eds), *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Vittorio Klostermann 1956). Many scholars rely on Scelle's concept, eg Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 International and Comparative Law Quarterly 57, 68; André Nollkaemper, 'The Duality of Direct Effect of International Law' (2014) 25 European Journal of International Law 105, 111. See also (with regard to the CJEU, which is often compared to a domestic court): André Nollkaemper, 'Between Dédoublement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci' (2009) 20 European Journal of International Law 862.

60 Samantha Besson and Odile Ammann, 'La pratique suisse relative à la détermination du droit international coutumier' (*Freiburger Schriften zum Europarecht Nr. 21 / Cahiers fribourgeois de droit européen n° 21*, 2016) <www.unifr.ch/ius/euroinstitut_fr/forschung/publikationen/freiburger_schriften>.

61 ILA, 'Preliminary Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (2012) <www.ila-hq.org/index.php/study-groups>; ILA, 'Working Session Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (2016) <www.ila-hq.org/index.php/study-groups>; ILA, '(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15); Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford University Press 2014); Nollkaemper, *National Courts and the International Rule of Law* (n 47) 17.

62 Weill (n 61) 2; ILA, '(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15) 2. See also Nollkaemper, *National Courts and the International Rule of Law* (n 47) 9 f.

approaches.[63] They have focused on the 'impact' of domestic case law[64] or of domestic law more generally on international law[65] and, *vice versa*, on the impact of international law on domestic cases.[66] Researchers have compiled national judicial decisions on international law,[67] and they have compared different States' domestic case law on international law.[68] Political scientists have typically been interested in why domestic courts apply international law.[69] Only a few authors suggest that domestic judges must or should conceive of their role in a particular way, be it from the perspective of domestic law[70] or from an international perspective.[71] In general, scholars often dwell on the outcome of domestic courts' judgments pertaining to international law, rather than on the interpretative framework and reasoning these courts use.[72]

63 Veronika Fikfak, 'Reinforcing the ICJ's Central International Role? Domestic Courts' Enforcement of ICJ Decisions and Opinions' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

64 Antonios Tzanakopoulos, 'Judicial Dialogue in Multi-Level Governance: The Impact of the Solange Argument' in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing 2012); 'International Law Through the National Prism: The Impact of Judicial Dialogue' (*Netherlands Organisation for Scientific Research*) <www.nwo.nl/en/research-and-results/research-projects/i/22/6722.html>.

65 Luigi Ferrari Bravo, 'International and Municipal Law: The Complementarity of Legal Systems' in R St J Macdonald and Douglas M Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff 1986); Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams 'International Law and National Law: Fluid States' in Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams (eds), *The Fluid State: International Law and National Legal Systems* (The Federation Press 2005) 8.

66 Eg Simon Olleson, *State Responsibility Before International and Domestic Courts: The Impact and Influence of the ILC Articles* (Oxford University Press 2013).

67 Fatima (n 45).

68 Anthea Roberts and others, 'Comparative International Law: Framing the Field' (2015) 109 American Journal of International Law 467; Roberts and others (n 8).

69 For an overview: Lisa Conant, 'Whose Agents? The Interpretation of International Law in National Courts' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 401 ff.

70 Curtis A Bradley, 'The Supreme Court as a Filter Between International Law and American Constitutionalism' (2016) 104 California Law Review 101.

71 Falk (n 50).

72 Eg Alexandra Huneeus, 'Courts Resisting Courts: Lessons From the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 Cornell International Law Journal 493; Raffaela Kunz, 'Weder entfesselt noch geknebelt: Rechtsfindung nationaler Gerichte in Zeiten globalen Regierens am Beispiel des Zusammenspiels mit EGMR und IAGMR' in

When scholars actually look at the methods courts do, must, or should follow when interpreting international law, they mostly focus on international courts.[73] A small number of contributions deal with the methods domestic courts do, must, or should employ.[74] Yet this work often remains at a relatively high level of generality, and it concentrates on the VCLT, without questioning it. Moreover, the implications of these studies for the Swiss judicial practice are not obvious. In domestic legal theory, many are interested in the phenomenology of judicial decision-making,[75] or in empirical difficulties judges face when deciding cases.[76] When courts' legal and/or moral[77] duties and the methodological aspects of their interpretative activity do take centre stage, scholars generally ignore international law.

2.2 *Domestic Bias*

This last remark leads us to a second point: while the nature and essence of judicial reasoning is one of the old chestnuts of jurisprudence,[78] legal theorists and

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Marje Mülder and others (eds), *Richterliche Unabhängigkeit: Rechtsfindung im Öffentlichen Recht, 58. Assistierendentagung Öffentliches Recht* (Nomos 2018). For a counterexample, see Juliette McIntyre, 'Same Pod, Different Peas: The Vienna Convention on the Law of Treaties in Australian and Canadian Courts' (2017) 3 Canadian Journal of Comparative and Contemporary Law 19.

73 Sienho Yee, 'Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases' (2016) 7 Journal of International Dispute Settlement 472; Maurice Mendelson, 'The International Court of Justice and the Sources of International Law' in Malgosia Fitzmaurice and Alan Vaughan Lowe (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996); Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (2017) 28 European Journal of International Law 357; Neha Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57 Harvard International Law Journal 111; Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion' (2015) 26 European Journal of International Law 417.

74 See the contributions in Aust and Nolte (n 47).

75 Duncan Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 Journal of Legal Education 518; Julia Hänni, *Vom Gefühl am Grund der Rechtsfindung: Rechtsmethodik, Objektivität und Emotionalität in der Rechtsanwendung* (Duncker & Humblot 2011).

76 Adrian Vermeule, 'Interpretive Choice' (2000) 75 New York University Law Review 74.

77 For a seminal account of how judges should decide cases, see Ronald Dworkin, *Law's Empire* (Belknap Press 1986).

78 HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994); Dworkin (n 77); Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press 1997); Julie Dickson, 'Interpretation and Coherence in Legal Reasoning', *Stanford Encyclopedia of Philosophy* (2001) <plato.stanford.edu/archives/spr2010/entries/legal-reas-interpret>; Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009).

philosophers have (but for a few exceptions)[79] shied away from international law.[80] Seminal work that has dealt with international law at the margins, such as HLA Hart's *Concept of Law*,[81] is outdated, at least with regard to newer developments on the international plane.[82] In recent years, calls for an expansion of the scope of 'municipal' jurisprudence have become more vocal,[83] and there have been scholarly efforts to address this jurisprudential blind spot[84] and to analyze judicial interpretation in international law.[85] Yet domestic courts and the interpretative methods of international law have made only rare

79 Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010); Jeremy Waldron, 'International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?' in Luís Duarte d'Almeida, James Edwards, and Andrea Dolcetti (eds), *Reading HLA Hart's 'The Concept of Law'* (Hart Publishing 2013); George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007); Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press 2013); John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 238 ff; William Twining, *General Jurisprudence: Understanding Law From a Global Perspective* (Cambridge University Press 2009); Keith Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford University Press 2010); Julie Dickson, 'Who's Afraid of Transnational Legal Theory? Dangers and Desiderata' (2015) 6 Transnational Legal Theory 565; Timothy Endicott, '"International Meaning": Comity in Fundamental Rights Adjudication' (2002) 13 International Journal of Refugee Law 280.

80 Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 78); Dworkin (n 77); Timothy Endicott, *Vagueness in Law* (Oxford University Press 2000); Michel Troper, Véronique Champeil-Desplats, and Christophe Grzegorczyk (eds), *Théorie des contraintes juridiques* (LGDJ/Bruylant 2005); Fuller (n 20); Patrick S Atiyah and Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1987).

81 Hart (n 78) ch X. For a critique: Waldron, 'International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?' (n 79).

82 Such recent trends include the growth of international adjudication, the shift from interstate to intrastate international law, and the codification of secondary norms of international law.

83 Joseph Raz, 'Why the State?' (2014) <papers.ssrn.com/sol3/papers.cfm?abstract_id=2339522>. On this evolution, see McCrudden (n 7) 644.

84 Besson and Tasioulas (n 79); Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (Cambridge University Press 2014).

85 Samantha Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' in Cesare Romano, Karen Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014); Hervé Ascensio, 'La notion de juridiction internationale en question' in SFDI (ed), *La juridictionnalisation du droit international* (Pedone 2003); Samantha Besson and Andreas R Ziegler (eds), *Le juge en droit européen et international / The Judge in European and International Law* (Schulthess 2013).

appearances in this context.[86] This gap is regrettable, since important insights have been gained on the nature and essence of judicial reasoning in domestic law. These analyses can undoubtedly be useful to international law if they are adjusted to the specificities of international lawmaking.

2.3 *'Amour Impossible'*

Third, although domestic judicial decisions are frequently relied upon *qua* interpretative guides in international legal practice, their place in the sources of international law is obscured by art. 38(1) ICJ Statute. This provision ambiguously refers to 'judicial decisions' as 'subsidiary means for the determination of rules of [international] law'. It reflects the 'amour impossible'[87] between the doctrine of the sources of international law and the influence that international[88] and domestic adjudication exert on international law in practice. While there is widespread agreement among scholars and practitioners that domestic rulings are not a source of international law, these actors often struggle to legally characterize the 'influence' that domestic courts have on the formation and evolution of international law. In practice, there is no doubt that domestic rulings on international law attract interest. They are included in many international law casebooks[89] which, already early on, contained 'copious references'[90] to them. They appear in domestic law digests,[91] and they are compiled in online databases.[92] Yet it is rarely explicitly acknowledged that these rulings contribute to the formation and evolution of treaty law, CIL, and general principles of international law, and that they are auxiliary means that help interpreters of international law in subsequent cases (*infra*, Chapter 4, section 3).

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86 See however Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56); Fatimata Niang, 'De quelques contraintes européennes sur le juge suisse' in Samantha Besson and Andreas R Ziegler (eds), *Le juge en droit européen et international / The Judge in European and International Law* (Schulthess 2013).

87 Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' (n 85); Ascensio (n 85).

88 Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' (n 85).

89 Among many others: Samantha Besson, *Droit international public : Abrégé de cours et résumés de jurisprudence* (3rd edn, Stämpfli 2016); Barry E Carter and Allen S Weiner, *International Law* (6th edn, Wolters Kluwer 2011). See also, more recently, André Nollkaemper and August Reinisch (eds), *International Law in Domestic Courts: A Casebook* (Oxford University Press 2018).

90 Lauterpacht, 'Municipal Decisions as Sources of International Law' (n 50) 68, footnote 1.

91 Eg ibid 67 f, footnote 1. On this issue, see Jennings (n 40).

92 ILDC (n 48). See also the International Law Reports, <www.cambridge.org/core/series/international-law-reports/69C73E3843D70A8CDB15CFA24351CC27>.

2.4 *Legal Imperative*

The lack of attention to domestic courts' interpretative methods when they interpret international law is problematic from the perspective of States' international obligations. This aspect is sometimes neglected in practice and scholarship.[93] It is important to point out that in this study, I focus on what international law requires. However, the law's interpretative methods must also be respected in virtue of domestic law, as I will emphasize (Chapter 6, *infra*).

Societies governed by law cannot afford to defer to judicial 'pragmatism', or to 'pragmatic methodological pluralism', as Swiss courts call their own interpretative approach (*infra*, section 3, and Chapter 3, 4.2.6). States (including judges) must abide by the law and its interpretative methods. This is true with regard to both domestic and international law, which share the same basic interpretative methods despite some differences that exist between domestic and international lawmaking (*infra*, Chapter 5, 3.3). Pragmatism hinders this objective when it is unpredictable, opaque, and inconsistent.

In this study, I primarily focus on States' legal duties, which States must honor via their organs, including their courts. More specifically, I zoom in on the law's interpretative methods. I do not study other moral duties and principles affecting the way courts should interpret international law, such as the principle of the rule of law, the principle of judicial integrity, and the principle of fidelity to the law. While these moral duties are undoubtedly important and have a major influence on judicial reasoning, the complex issues they raise must be left for another occasion.

My study is not limited to evaluating whether Swiss courts' interpretations conform with what the law requires: I also examine whether these interpretations are good interpretations, in the sense that they succeed in illuminating the legal meaning of their object in a predictable, clear, and consistent way. Whether these characteristics of what makes a high-quality interpretation contribute to the legitimacy of this interpretation is beyond the scope of my project. Instead, I start from the assumption that these virtues are set by legal practice itself, be it domestic or international, and that it is worthwhile to pursue them. The fact that these virtues are aspirational, that there might be tensions between some of them, and that courts often fail to meet them, does not mean that these virtues are not and should not be used as guides. As a matter of fact, adherence to them pervades our legal practices, and both domestic and international lawyers and scholars routinely use them to evaluate judicial interpretations.

93 Jan Klabbers, 'Virtuous Interpretation' in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff 2010). See also the case law discussed in Chapters 7 and 8 (*infra*).

2.5 *Swiss Gap*

As of today, a comprehensive scholarly overview and evaluation of the Swiss judicial practice of international law from the perspective of interpretative methods is missing. Scholars have analyzed the 'Europeanization'[94] and 'internationalization' (or 'globalization')[95] of Swiss law and politics. They have highlighted the growing empirical relevance international law has had in the Swiss legal order in recent decades.[96] Articles have been devoted to the persuasive authority of EU law in the Swiss legal and judicial practice,[97] and to the way Swiss courts deal with conflicts between domestic law and IHRL.[98] Some monographs address selected aspects of Swiss courts' application of international law, eg by compiling existing case summaries[99] or by highlighting specific features of the case law.[100] However, there is no overarching account of how Swiss courts do and must interpret international law that is not confined to particular substantive areas,[101]

94 Emilie Kohler, *Le rôle du droit de l'Union européenne dans l'interprétation du droit suisse* (Stämpfli 2015); Francesco Maiani, 'Lost in Translation: Euro-Compatibility, Legal Security, and the Autonomous Implementation of EU Law in Switzerland' (2013) 1 European Law Reporter 29.

95 Eg Carl Baudenbacher, 'Judicial Globalization: New Development or Old Wine in New Bottles?' (2003) 38 Texas International Law Journal 505; Wolf Linder, 'Swiss Legislation in the Era of Globalisation: A Quantitative Assessment of Federal Legislation (1983–2007)' (2014) 20 Swiss Political Science Review 223.

96 Linder (n 95).

97 Francesco Maiani, 'La "saga Metock", ou des inconvénients du pragmatisme helvétique dans la gestion des rapports entre droit européen, droit bilatéral et droit interne' (2011) 130 Zeitschrift für Schweizerisches Recht / Revue de droit suisse 27; Maiani (n 94); Samantha Besson and Odile Ammann, 'L'interprétation des accords bilatéraux Suisse-UE : une lecture de droit international' in Astrid Epiney and Stefan Diezig (eds), *Schweizerisches Jahrbuch für Europarecht 2013/2014 / Annuaire suisse de droit européen 2013/2014* (Schulthess 2014).

98 Eva Maria Belser and Rekha Oleschak Pillai, 'Engagement of Swiss Courts With International Law: Looking at the Swiss Federal Supreme Court and Its Ways of Dealing With Conflicts Between Domestic Law and International Human Rights Guarantees' (on file with author).

99 Andreas R Ziegler (ed), *La jurisprudence suisse du droit international public : les grands arrêts du Tribunal fédéral suisse de droit international public* (Dike 2015).

100 Helen Keller, *Rezeption des Völkerrechts: Eine rechtsvergleichende Studie zur Praxis des U.S. Supreme Court, des Gerichtshofes der Europäischen Gemeinschaften und des schweizerischen Bundesgerichts in ausgewählten Bereichen* (Springer 2003).

101 Olivier Jacot-Guillarmod, *Le juge national face au droit européen : perspective suisse et communautaire* (Helbing & Lichtenhahn/Bruylant 1993); Astrid Epiney, Beate Metz, and Benedikt Pirker, *Zur Parallelität der Rechtsentwicklung in der EU und in der Schweiz: Ein Beitrag zur rechtlichen Tragweite der 'Bilateralen Abkommen'* (Schulthess 2012); Eleanor Cashin Ritaine, 'Le juge suisse confronté au droit étranger' (2015) 25

sources,[102] or norms[103] of international law, or to particular aspects of the relationship between Swiss law and international law.[104] Most contributions dealing with Swiss courts' interpretative methods focus on domestic law[105] and the so-called 'pragmatic methodological pluralism'[106] used by the Swiss Federal Tribunal to interpret Swiss law. They often do so without challenging this pragmatic approach, and without looking at how it plays out with regard to international law.[107] Foreign (non-Swiss) legal scholars sometimes mention

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Schweizerische Zeitschrift für internationales und europäisches Recht / Revue suisse de droit international et de droit européen 33; Vanessa Thalmann, *Reasonable and Effective Universality: Conditions to the Exercice by National Courts of Universal Jurisdiction* (Schulthess 2018).

102 Mario Kronauer, *Die Auslegung von Staatsverträgen durch das Schweizerische Bundesgericht* (Polygraphischer Verlag 1972); Simonetta Stirling-Zanda, 'The Determination of Customary International Law in European Courts (France, Germany, Italy, The Netherlands, Spain, Switzerland)' (2004) 4 Non-State Actors and International Law 3; Olivier Jacot-Guillarmod, 'Strasbourg, Luxembourg, Lausanne et Lucerne : Méthodes d'interprétation comparées de la règle internationale conventionnelle' in Jean-François Perrin (ed), *Les règles d'interprétation : principes communément admis par les juridictions, Enseignement du 3e cycle de droit 1988* (Editions universitaires, 1989); Besson and Ammann (n 60).

103 Xavier Oberson, 'Récents développements dans le droit de l'assistance internationale en matière fiscale, notamment avec les Etats-Unis : sept leçons à tirer de l'affaire UBS' in François Bellanger and Jacques de Werra (eds), *Genève au confluent du droit interne et du droit international : Mélanges offerts par la Faculté de droit de l'Université de Genève à la Société suisse des juristes à l'occasion du Congrès 2012* (Schulthess 2012); Gregor T Chatton, *Vers la pleine reconnaissance des droits économiques, sociaux et culturels* (Schulthess 2014); Epiney, Metz, and Pirker (n 101).

104 Daniel Wüger, *Anwendbarkeit und Justiziabilität völkerrechtlicher Normen im schweizerischen Recht: Grundlagen, Methoden und Kriterien* (Stämpfli 2005).

105 Ernst Kramer, *Juristische Methodenlehre* (4th edn, CH Beck/MANZ/Stämpfli 2013); Alain Papaux, *Introduction à la philosophie du 'droit en situation' : de la codification légaliste au droit prudentiel* (Schulthess 2006); Tornike Keshelava, *Der Methodenpluralismus und die ratio legis: Eine sprachkritische Untersuchung* (Schulthess 2012); Pascal Pichonnaz and Stefan Vogenauer, 'Le "pluralisme pragmatique" du Tribunal fédéral : une méthode sans méthode ? Réflexions sur l'ATF 123 III 292' (1999) Aktuelle juristische Praxis / Pratique juridique actuelle 417; Marc Amstutz and Marcel Alexander Niggli, 'Recht und Wittgenstein I., Wittgensteins Philosophie als Bedrohung der rechtswissenschaftlichen Methodenlehre' in Pierre Tercier (ed), *Gauchs Welt: Festschrift für Peter Gauch zum 65. Geburtstag* (Schulthess 2004).

106 As I will explain in more detail (*infra*, Chapter 3, 4.2.6), 'pragmatism' is used by the Court to denote an anti-theoretical approach, on the one hand, and a result-oriented one, on the other. 'Pluralism' designates the fact that the Court does not accept any hierarchy among the interpretative methods.

107 On this issue, see Besson and Ammann (n 97).

Swiss cases to illustrate their theories and findings,[108] but they seldom go beyond the cases available in the ILDC database of Oxford University Press.[109] This is problematic, be it only because the small sample of Swiss decisions included is hardly representative.[110]

3 Why Switzerland?

To study the interpretation of international law in domestic courts without looking at a specific domestic legal order has the advantage of yielding broadly applicable findings about the domestic judicial practice. However, the difficulty with such an approach is that many domestic legal (and, of course, extra-legal) features constrain[111] and influence how the courts of a given State interpret international law. Some States are monist and directly incorporate international law into their legal order. Others are dualist and require that international law be transposed domestically in order to be valid under domestic law. In some jurisdictions, courts are bound by a doctrine of *stare decisis*. In others, adherence to precedent is not a judicial duty, even if judges usually seek to maintain consistency across cases. Some courts issue majority, plurality, and dissenting opinions, have transparent voting procedures, and have the legal power to strike down laws deemed unconstitutional and/or incompatible with their State's international obligations, while courts in other States do not. Some nations are members of many international and regional organizations and host a range of such organizations on their territory. Others are more isolated and, therefore, are not confronted with specific international legal issues.

Explaining and evaluating the features of domestic courts' interpretative activity while remaining disconnected from the idiosyncrasies of domestic legal orders risks generating very thin findings that remain at a high level of generality. As the domestic judicial practice of international law is heterogeneous,[112] entering the 'domestic thicket'[113] in which international law is embedded

108 Mathias Forteau, 'The Role of the International Rules of Interpretation for the Determination of Direct Effect of International Agreements' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016); Nollkaemper, *National Courts and the International Rule of Law* (n 47).

109 Forteau (n 108); Nollkaemper, *National Courts and the International Rule of Law* (n 47).

110 As of June 2019, the database contained 37 Swiss decisions.

111 On this concept, see Troper, Champeil-Desplats, and Grzegorczyk (n 80).

112 Nolte (n 42).

113 Carter and Weiner (n 89) 150.

provides a richer understanding of how international law penetrates domestic legal orders, and of how the domestic judicial practice must and can be improved.

While some insights about the courts of one State cannot be generalized, others are more broadly applicable. Some international legal issues arise more frequently in some jurisdictions than in others, and this practice can inform courts in other States with less experience of such issues. Moreover, the Swiss legal order is influenced by the legal systems of France, Germany, Italy, the United States and, in recent years, increasingly by EU law, which warrants cross-fertilization. The conditions under which domestic legal orders can borrow from the practice of other States are complex. They represent a core issue in comparative law that I cannot fully develop here. Instead, I want to stress that Swiss courts' practice of international law offers an interesting case study for a variety of reasons. These reasons, I argue, outweigh other factors that could speak against taking Switzerland as a main example, eg its relatively small population, its idiosyncratic foreign policy, and its moderate, if not weak geopolitical power (which could justify labelling Switzerland a 'semiperipheral' State).[114]

First, Switzerland is monist (*infra*, Chapter 3, 2.2.1): international law is interpreted by Swiss courts without having to be transposed into domestic law and, therefore, without prior legislative intervention.[115] Courts in dualist States interpret international law too, albeit in its 'domesticated' form. Given the absence of such a legislative filter in Switzerland,[116] Swiss courts' contribution to the domestic interpretation of international law is likely to be significant.

Second, because of the characteristics of Swiss foreign relations (*infra*, Chapter 3, 2.1), eg the presence of numerous IOs on Switzerland's territory and its treaty relationships with other States and organizations like the EU, the Swiss legal order is confronted with a range of international legal issues that may not exist, or be as salient, in other States.

Third, Swiss courts' institutional relationship to the political branches is noteworthy. Indeed, Swiss judges operate in a semi-direct democracy where citizens can have a say on issues of foreign relations and on the relationship

114 This terminology is used by Anthea Roberts. See Roberts, *Is International Law International?* (n 9) 45.

115 One could argue that all States are initially dualist, since they have the power to establish the conditions under which international law is given effect in their legal order. If one follows this view, States subsequently become monist or dualist.

116 Of course, Swiss courts also interpret domestic legislation that implements international legal obligations.

between domestic law and international law (*infra*, Chapter 3, 3.4). Moreover, Swiss judges are typically elected by the legislature and, as a result, affiliated with a political party (*infra*, Chapter 3, 4.2.4). This proximity of politics to foreign relations law, on the one hand, and to courts, on the other, is based on considerations of democratic legitimacy. It also makes it all the more important that Swiss courts maintain the independence and impartiality required by their domestic legal duty to abide by the law and by some of Switzerland's international obligations.

Fourth, the Swiss State has an ambiguous relationship to international law. One important cause of ambivalence is the recent success, at the ballot box, of political initiatives challenging Switzerland's existing international obligations, but it is not the only one. Other factors include Switzerland's commitment to neutrality, and its reluctance to join organizations such as the EU and, until 2003, the UN (*infra*, Chapter 3, 2.1). Of course, this ambiguity exists in the vast majority of States, yet the combination of the aforementioned factors, including this 'Swiss exceptionalism', makes the Swiss case law particularly intriguing.

Fifth, Swiss courts rely on a so-called 'pragmatic methodological pluralism' to interpret the law, including international law. (For a more detailed analysis of this concept, see *infra*, Chapter 3, 4.2.6.) In short, 'pragmatism' (as the term is used by the Swiss Federal Tribunal, and in contrast with its philosophical meaning)[117] describes Swiss judges' result-oriented and anti-theoretical approach to interpretation. 'Pluralism' denotes their rejection of any hierarchy between the law's interpretative methods. Especially due to Swiss courts' pragmatism, and due to the fact that this anti-theoretical flavor is also reflected in many Swiss scholarly pieces on judicial interpretation,[118] the Swiss case law needs further theorizing. This also applies to international law: as Eva Maria Belser and Rekha Oleschak Pillai note, '[t]he way in which domestic courts in Switzerland engage with international law and how they choose between avoidance, alignment and contestation strategies is often difficult to predict and sometimes hard to understand'.[119]

Finally, despite its aforementioned idiosyncratic features, Switzerland is left out of the vast majority of comparative analyses of domestic courts'

117 Christopher Hookway, 'Pragmatism', *Stanford Encyclopedia of Philosophy* (2008) <plato.stanford.edu/entries/pragmatism>.

118 Hans Peter Walter, 'Die Praxis hat damit keine Mühe … oder worin unterscheidet sich die pragmatische Rechtsanwendung von der doktrinären Gesetzesauslegung – wenn überhaupt?' (2008) 144 Zeitschrift des Bernischen Juristenvereins 126.

119 Belser and Oleschak Pillai (n 98) 1.

interpretation of international law.[120] More generally, English-speaking jurisdictions such as the United States and the United Kingdom are overrepresented in relevant scholarship (*inter alia* out of linguistic convenience),[121] but also in databases providing access to domestic judgments pertaining to international law. Moreover, relatively few publications include the Swiss legal order.[122] These gaps are unfortunate, especially given Switzerland's good overall compliance with international law[123] and its democratic political culture. One of my aims is thus to make the Swiss practice more accessible to scholars and practitioners. While considerations of visibility (and, for publishers, profitability) increasingly constrain the choices scholars make when determining which jurisdictions to focus on, there is a case for studying small States, too. International legal scholarship must also focus on less 'mainstream' domestic legal orders than the usual suspects, namely the United States, the United Kingdom, etc. As Gelter and Siems note, 'lawyers, judges, and legal scholars in the smaller country in such an asymmetric relationship often are aware of current legal developments in the larger one, while jurists from the larger country remain ignorant about developments in the smaller one'.[124] Moreover, contrary to many large and powerful States, smaller and less influential States have a strong interest in ensuring that international legal obligations are taken seriously.[125]

120 Aust and Nolte (n 47); Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Brill/Nijhoff 1997); Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011); David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009).

121 See the examples cited in 'Article 19. Interpretation of Treaties' (1935) 29 American Journal of International Law 937.

122 There are some exceptions, of course, eg Neumann and Peters (n 12); Stirling-Zanda (n 102); Andreas R Ziegler, 'Subtle but Enduring – The Role of Domestic Courts in the Shaping of International Economic Law Through Proper Interpretation of Domestic Law: The WTO Agreement Before Swiss Courts' in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing 2012); Thurnherr (n 12); Keller (n 100).

123 On the ECHR, for instance, see Switzerland Press Country Profile (last updated in April 2019), <www.echr.coe.int/Documents/CP_Switzerland_ENG.pdf>. See also the (overall positive) concluding observations of the various UN treaty bodies pertaining to Switzerland, <tbinternet.ohchr.org/_layouts/TreatyBodyExternal/TBSearch.aspx>.

124 Martin Gelter and Mathias M Siems, 'Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe' (2014) 21 Supreme Court Economic Review 215, 247.

125 Federal Council, *Botschaft zur Volksinitative 'Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)'*, FG 2017 5355, at 5407.

4 Why Courts?

One could argue that international law (just like domestic law) is 'interpreted' by a broad range of actors: governments, diplomats, legislatures, IOs, NGOs, corporations, judges, municipal officials, lawyers, and other individuals all engage in international legal interpretation.[126]

This is indeed true if we consider the broad meaning of 'legal interpretation' in ordinary language.[127] Moreover, some international legal acts are predominantly interpreted by specific authorities. In Switzerland, CIL is mostly interpreted by the federal executive, less frequently by courts, and only exceptionally by the legislature.[128] Yet not all actors we loosely consider to be 'legal interpreters' have the legal duty to explain the law's meaning to others,[129] and the power to do so in a legally authoritative way, ie, in a way that gives reasons for action to the law's subjects. Courts, on which I focus, are unique in this respect.

Still, why narrow down my study to the interpretations of 'judges in black robes',[130] instead of taking a broader look at how international law must be interpreted by legal officials? Why focus on domestic courts, ie, on judicial institutions constituted by domestic law, of which the jurisdiction and procedural law are governed by domestic law?[131]

This choice is justified because, in contemporary societies governed by law, courts have the legal duty to provide reasons for their decisions.[132] Given courts' duty to obey the law, these reasons must be legally relevant; otherwise, courts act unlawfully.[133] Said reasons must show that the judicial decision is indeed required by law, as opposed to policy, tradition, or etiquette. Other State

126 Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012); Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015).

127 Raquel Barradas de Freitas, *Explaining Meaning: Towards a Minimalist Account of Legal Interpretation* (University of Oxford 2013, on file with author) 2 f.

128 Besson and Ammann (n 60).

129 Barradas de Freitas (n 127) 2 f.

130 Dworkin (n 77) 12.

131 See *e contrario* Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' (n 85) 418.

132 Zenon Bankowski and others, 'On Method and Methodology' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (Aldershot 1991) 13 f; Hutchinson and Duncan (n 7) 107.

133 Barradas de Freitas (n 127) 182.

organs do not have comparable duties: provided it respects the applicable legal procedure, the executive can make decisions based on strategic considerations, and domestic legislatures typically adopt new laws because such laws are deemed opportune by their majority. By contrast, as US Supreme Court Justice John Marshall famously held in *Marbury v. Madison*, '[i]t is emphatically the province and duty of the judicial department to say what the law is'.[134] Thus, judicial interpretation lends itself particularly well to legal analysis. It is also worth recalling that we (lawyers) typically[135] evaluate judicial interpretations based on the extent to which they are lawful, predictable, clear, and consistent. We do not simply assess them based on their rhetorical appeal or a cost-benefit analysis, for instance. It is precisely such a legal evaluation that I undertake in this study.

5 Why Domestic Courts?

If courts are particularly interesting (*supra*, section 4), why study domestic courts rather than international ones?[136] One reason is that, from the perspective of the sources of international law, domestic judicial decisions help ascertain international law in general (art. 38(1)(d) ICJ Statute), but also – and this distinguishes them from international rulings – constitute elements for its determination (art. 38(1)(a)–(c) ICJ Statute) (*infra*, Chapter 4, section 3). Indeed, a domestic ruling, if consolidated by the practice of other national institutions and States, can shape the 'subsequent practice' of the parties to a treaty (art. 38(1)(a) ICJ Statute, art. 31(3)(b) VCLT), lead to the emergence of CIL (art. 38(1)(b) ICJ Statute), or express States' recognition of a general principle of law (art. 38(1)(c) ICJ Statute). Moreover, like international rulings, domestic judgments are 'subsidiary means for the determination of rules of [international] law' (art. 38(1)(d) ICJ Statute). The more these rulings conform to the criteria of legality and high-quality reasoning (*supra*, Introduction, section 3), the more guidance they provide for future interpretations of international law, both domestically and on the international plane.

Of course, domestic rulings also distinguish themselves in virtue of their legal authority in the domestic legal order. Some international courts (such as

134 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), at 177.

135 At least to the extent we engage in doctrinal and theoretical legal analysis, and not in moral or political philosophy, for instance.

136 I clarify the notions of 'domestic court' and 'international court' in Chapter 2, section 4 (*infra*).

the ECtHR or the ICJ) have the power – subject to the characteristics of their respective jurisdiction – to authoritatively determine States' rights and obligations. Yet States are usually free to choose the means by which to enforce such rulings domestically. By contrast, domestic rulings are always legally authoritative domestically, unless they are appealed to a higher domestic instance. They can hence give effect to the State's international legal obligations in the domestic legal order. Domestic rulings have decisional authority, but also, in some cases, interpretive authority in the domestic legal order (ie, authority in the context of future interpretations of the law).[137]

Another reason that makes it worthwhile to focus on domestic courts is that they adjudicate a broader range of issues than international judges. Indeed, in principle,[138] domestic courts' jurisdiction encompasses domestic law, international law (be it in its domesticated or in its original form, depending on whether the domestic legal order is dualist or monist), and issues pertaining to the relationship between domestic and international law. International judges, by contrast, usually have jurisdiction over a narrower subset of issues, and they do not in principle interpret domestic law (*infra*, Chapter 2, section 4). Due to the scope of their jurisdiction, it is all the more important that domestic courts reach their decisions in conformity with what the law and high-quality legal reasoning require.

Moreover, as Hege Elisabeth Kjos notes, 'international courts and tribunals stand in the shadow of domestic courts when it comes to the number of cases rendered with a public international law dimension'.[139] This justifies looking at domestic courts, and not merely at international ones, as is often the case in scholarship.

In this book, I distinguish domestic courts from regional ones, such as the ECtHR or the CJEU. The latter have the legal power to bind a number of States,

137 On the distinction between decisional and interpretive authority in the context of international adjudication, see Samantha Besson, 'The Erga Omnes Effect of Judgments of the European Court of Human Rights – What's in a Name?' in Samantha Besson (ed), *La Cour européenne des droits de l'homme après le Protocole 14 : Premier bilan et perspectives / The European Court of Human Rights After Protocol 14: Preliminary Assessment and Perspectives* (Schulthess 2011) 129; Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' (n 85) 420.

138 Some international legal issues may be removed from domestic courts' jurisdiction, eg Chapter 3, 4.2.1 (*infra*).

139 Hege Elisabeth Kjos, 'International Law Through the National Prism: The Role of Domestic Law and Jurisprudence in Shaping International Investment Law' in Mary E Footer, August Reinisch, and Christina Binder (eds), *International Law and … Select Proceedings of the European Society of International Law, Vol 5, 2014* (Hart Publishing 2016) 269.

which usually belong to a specific geographic area, and which have accepted the jurisdiction of these regional judicial bodies. Admittedly, given its position as the highest court of an autonomous legal order (which is not the case of the ECtHR), the CJEU can be likened to a domestic court in cases where it interprets international law.[140] Yet the fact that the EU legal order is integrated into domestic legal orders and that international law is interpreted both at the EU level and by the courts of the EU Member States adds a layer of complexity to the analysis. This limits the applicability of the 'domestic court' analogy.

I also distinguish domestic courts from hybrid ones, such as the Special Tribunal for Lebanon or the Extraordinary Chambers in the Courts of Cambodia. The jurisdiction and/or procedural law of hybrid courts are governed by both domestic and international law, and these courts usually operate for a limited period, with a narrower jurisdiction than domestic courts. Hybrid courts hence form a category of their own.

It is important to stress than by emphasizing the role of domestic courts, my aim is not to suggest that these courts should step in and solve every issue that arises at the interface of the domestic legal order and international law. The rule of law is sometimes (erroneously) viewed as 'synonymous with "the rule of the Courts"'.[141] In liberal democracies like Switzerland (*infra*, Chapter 3, section 3), fundamental decisions that affect a society should be made at the ballot or in parliament rather than in the courtroom. Still, domestic judgments shape international law and its relationship to domestic law (and, of course, domestic law itself). This fact is often ignored or sidelined in scholarly[142] and

140 ILA, '(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15) 2; ILA, 'Preliminary Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61) 2; Helmut Philipp Aust, Alejandro Rodiles, and Peter Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 Leiden Journal of International Law 75, 100. On this issue, see eg Jed Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?' (2014) 3 Cambridge Journal of International and Comparative Law 696; Odile Ammann, 'The Court of Justice of the European Union and the Interpretation of International Legal Norms: To Be or Not to Be a "Domestic" Court?' in Samantha Besson and Nicolas Levrat (eds), *L'Union européenne et le droit international / The European Union and International Law* (Schulthess 2015).

141 Arthur Lehman Goodhart, 'The Nature of International Law' (1936) 22 Transactions of the Grotius Society 31, 85.

142 Andreas Glaser, 'Umsetzung und Durchführung des Rechts der Bilateralen Verträge in der Schweiz: Institutionen und Verfahren' in Andreas Glaser and Lorenz Langer (eds), *Die Verfassungsdynamik der europäischen Integration und demokratische Partizipation: Erfahrungen und Perspektiven in Österreich und der Schweiz* (Dike/Nomos/

official[143] analyses of (and public debates on) the relationship between domestic and international law. It is therefore important to scrutinize domestic courts' activity and, if necessary, to formulate recommendations for its improvement.

6 Why International Law?

Do domestic courts deal with legal acts that are distinctive from domestic ones when they interpret international law? Arguably not, for in some respects, the 'divide' between domestic and international law is anything but sharp.[144] Written and unwritten law, agreements (both private and public), custom, and general principles exist in both domestic and international law. Many sources of international law draw upon State practice. Domestic laws often mention the State's international legal obligations, and domestic legal practices enable (or undermine) the observance of these obligations in the domestic legal order. State organs implement both domestic and international law.[145] Importantly, the respective subject matters of these two bodies of law tend to converge,[146] especially due to the proliferation of 'inward-looking'[147] international legal norms governing States' conduct within their own jurisdiction.

Because of these overlaps between domestic and international law (which scholars have captured via concepts such as 'consubstantial norms',[148]

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facultas 2015); Andreas Glaser and Lorenz Langer, 'Die Institutionalisierung der Bilateralen Verträge: Eine Herausforderung für die schweizerische Demokratie' (2013) 23 Schweizerische Zeitschrift für internationales und europäisches Recht / Revue suisse de droit international et de droit européen 563.

143 Federal Council, *Das Verhältnis von Völkerrecht und Landesrecht, Bericht des Bundesrates in Erfüllung des Postulats 07.3764 der Kommission für Rechtsfragen des Ständerates vom 16. Oktober 2007 und des Postulats 08.3765 der Staatspolitischen Kommission des Nationalrates vom 20. November 2008*, 5 March 2010, FG 2010 2263 (hereinafter: Federal Council, *2010 Report on International and Domestic Law*).

144 Janne E Nijman and André Nollkaemper, 'Introduction' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007).

145 Jonkheer HF van Panhuys, 'Relations and Interactions Between International and National Scenes of Law' (1964) 112 Recueil des cours de l'Académie de droit international 7.

146 Ximena Fuentes Torrijo, 'International Law and Domestic Law: Definitely an Odd Couple' (2008) 77 Revista Jurídica Universidad de Puerto Rico 483.

147 Christian J Tams and Antonios Tzanakopoulos, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 Leiden Journal of International Law 531, 534.

148 Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (n 57); ILA, 'Preliminary Report of the ILA Study Group on

'multi-sourced equivalent norms',[149] or 'interface norms'),[150] it could be argued that when domestic courts interpret international law, their activity is not fundamentally different from the interpretation of domestic law. Yet domestic laws should not be equated too hastily with international ones, as domestic and international lawmaking processes are distinct.[151] While domestic laws are created by the legislature of one State (and, to a certain extent, by this State's judicial and executive organs), international lawmaking typically involves at least two States via their organs.[152] This difference determines the way international law must be interpreted. For instance, one cannot solely resort to one State's unilateral, internal practice to ascertain international law. Domestic courts must take the characteristics of international lawmaking into account. Otherwise, they are not interpreting the *interpretandum*.

International law creates distinctive challenges for legal interpreters, not only because its process of formation differs from that of domestic norms, but also because it is frequently vague, as I will argue in more detail (*infra*, Chapter 5, 4.1.2).[153] Unfortunately, and to expand on my previous remarks on the topic (*supra*, 2.2), legal theorists and philosophers have tended to neglect international law, with the exception, perhaps, of international human rights law.[154] Detailed jurisprudential analyses of the interpretation of international

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Principles on the Engagement of Domestic Courts With International Law' (n 61); ILA, '(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15) 13. For a critique of this terminology (but not of the existence of relationships between domestic and international law, eg in IHRL): Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56).

149 Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing 2011).

150 Nico Krisch, 'Pluralism in International Law and Beyond' (2015) 8 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2613930>.

151 Samantha Besson, 'Theorizing the Sources of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 167.

152 See also Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 European Journal of International Law 907, 915.

153 On vagueness, see Hart (n 78) 124 ff. On its relationship to open texture, see Friedrich Waismann, 'Symposium: Verifiability' (1945) 19 Proceedings of the Aristotelian Society 119, 123; Joseph Horovitz, *Law and Logic: A Critical Account of Legal Argument* (Springer 1972) 9; Frederick Schauer, 'On the Open Texture of Law' (2011) 4 f <papers.ssrn.com/sol3/papers.cfm?abstract_id=1926855>. See also *infra*, Chapter 5.

154 Eg Endicott, '"International Meaning": Comity in Fundamental Rights Adjudication' (n 79); Kristen Hessler, 'Resolving Interpretive Conflicts in International Human Rights Law' (2005) 13 Journal of Political Philosophy 29.

law are rare in canonical works of legal theory. Even scholars who have provided seminal descriptive or normative accounts of the mechanics of domestic adjudication have often bracketed international law.[155] This also applies to Swiss scholarship on domestic adjudication. As Holger Fleischer notes, 'most literature on [legal interpretation and statutory interpretation] still treats interpretative methodology as a national field of study'.[156] This neglect, which has a range of causes[157] that I cannot fully explore here, makes it timely to devote attention to the topic.

Another important justification and trigger for analyzing domestic courts' interpretation of international law is that this activity takes up an increasingly significant place in domestic (and Swiss)[158] adjudication. This practical significance is not only due to Switzerland's growing network of treaties with other States and IOs. It is also symptomatic of a shift in the subject matter of international law. As is well known, this body of law is evolving from a law predominantly governing interstate relationships to one increasingly concerned with intrastate matters. Many other factors explain the rising significance of international law in domestic and Swiss courts, such as the internationalization of judges and lawyers' legal education, or the greater accessibility of international legal documents (see however *infra*, Conclusion and Recommendations, section 2). The precise weight of these causes would require empirical verification and will not be dwelled upon here. What matters, for my purposes, is that the relevance of international law in domestic courts makes it a worthwhile and topical object of inquiry.

A last reason for focusing on international law relates to the specificities of the Swiss legal order (*infra*, Chapter 3), and to the impact of these features on the relationship between domestic and international law. Chief among these peculiarities are Switzerland's semi-direct democracy (*infra*, Chapter 3, 3.4), coupled with recent trends in Swiss politics. In the past, popular proposals to

155 Kennedy, *A Critique of Adjudication* (n 78); Hart (n 78); Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 78); Dworkin (n 77); Henry M Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (mimeographed, tentative edition 1958).

156 Holger Fleischer, 'Comparative Approaches to the Use of Legislative History in Statutory Interpretation' (2012) 60 American Journal of Comparative Law 401, 402.

157 This neglect may for instance be due to a lack of specialized training or interest in international law, to a sense that international law is not conceptually different from domestic law or, to the contrary, to a sense that the (alleged) 'inferiority' of international law justifies analyzing it separately from domestic law.

158 Ammann, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (n 5).

amend the Swiss Constitution were rarely accepted by Swiss voters, but in the last couple of decades the success rate of these popular initiatives has risen significantly. This, and the increased targeting of international law by some political groups,[159] creates tensions with Switzerland's international obligations. Because the Swiss Constitution does not offer mechanisms to arbitrate conflicts between constitutional or federal statutory law, on the one hand, and international law, on the other,[160] this task is shifted to the courts. In light of the scarce guidance provided by the Constitution, Swiss courts face the challenge of having to develop a predictable, clear, and consistent approach to such conflicts. Their 'pragmatic methodological pluralism' (*infra*, Chapter 3, 4.2.6), in particular, needs to be critically evaluated in the context of the interpretation of international law and, if necessary, adjusted to its specificities. More generally, in a time when international law experiences heightened contestation and criticism in the domestic political realm,[161] it is particularly essential that judges, international lawyers, and the public in general remain aware of the mandatory international legal framework that constrains States in the interpretation of their international obligations.

7 Why Focus on the Law's Interpretative Methods?

A method is a way of doing something. It designates 'a systematic procedure, technique, or mode of inquiry employed by or proper to a particular discipline or art'.[162]

I focus on what methods international law requires States to use when they interpret international legal acts via their organs, and more specifically via their courts. However, it is worth noting that domestic courts also have the duty to respect the law's interpretative methods under domestic law. Of course, the differences between domestic and international lawmaking explain why the methods that have developed in domestic legal orders diverge, in some minor respects, from the interpretative methods of international law. One example

159 See in general Tamar Hostovsky Brandes, 'International Law in Domestic Courts in an Era of Populism' (2019) 17 International Journal of Constitutional Law 576.

160 See especially art. 5(4) and art. 190 Cst.

161 Eg James Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81 Modern Law Review 1; Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1.

162 See the definition of 'method' in <www.merriam-webster.com/dictionary/method>. I explore related, yet distinct concepts in Chapter 2, section 5 (*infra*).

concerns the use of legislative history, which is only permitted under specific conditions under international law. Under Swiss law, by contrast, historical interpretation is on the same footing as other interpretative methods. However, these domestic peculiarities are irrelevant from the perspective of international law. They are not valid justifications for disregarding the interpretative methods of international law. Moreover, such nuances should not detract from the fact that the basic methods of interpretation of domestic and international law, and their respective justifications, are identical (see Chapters 5 and 6, *infra*).

For many years now, methods of judicial interpretation have come under heavy criticism. Sean D. Murphy even writes that '[c]ontroversy over the utility and limits of canons and other interpretive principles has bedevilled the field of jurisprudence since ancient times'.[163] Legal realists,[164] critical legal scholars,[165] and political scientists[166] have emphasized that judicial reasoning is influenced by arbitrary considerations. First, such authors are usually skeptical of attempts to discern a method in domestic judicial decisions. 'When someone starts talking about "interpretation", reach for your gun',[167] some warn. Others consider that what the law is depends on what judges 'ate for breakfast'.[168] Second, these scholars typically argue that formulating normative recommendations for domestic courts regarding the methods they must use (which is my endeavor in this study) is futile because judicial interpretation is inherently 'political' and judicial discretion inevitable. Curtis Mahoney notes that in the United States, the interpretative methods of treaty law are 'undertheorized'.[169] In Switzerland, many judges, lawyers, and legal scholars are reluctant to reflect upon the methods of judicial reasoning and to revise

163 Sean D Murphy, 'The Utility and Limits of Canons and Other Interpretive Principles in Public International Law' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2018) 13.

164 Eg Holmes (n 22).

165 Eg Kennedy, *A Critique of Adjudication* (n 78); Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (n 75).

166 Eg Martin M Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981).

167 William G Lycan, *Judgement and Justification* (Cambridge University Press 1988) 195. This sentence is cited in Michael S Moore, 'The Interpretive Turn in Modern Theory: A Turn for the Worse?' (1989) 41 Stanford Law Review 871, 871.

168 Alex Kozinski, 'What I Ate for Breakfast and Other Mysteries of Judicial Decision Making' (1993) 26 Loyola of Los Angeles Law Review 993.

169 Curtis J Mahoney, 'Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties' (2007) 116 Yale Law Journal 824, 828.

existing accounts of adjudication. Hans Peter Walter, who served on the Swiss Federal Tribunal from 1984 to 2002, explains that the Court's 'pragmatic methodological pluralism' (*supra*, 2.5 and *infra*, Chapter 3, 4.2.6) is unproblematic in practice,[170] and most Swiss scholars do not question the 'pragmatic' approach. Third, prudentialism (a doctrine that seeks to maximize the protection of some interests, and hence to avoid outcomes jeopardizing them) has gained traction in legal thinking.[171] It is highly prevalent in public debates and official statements regarding Switzerland's relationship with international law.[172] The Swiss executive more often mentions the strategic importance for Switzerland to respect international law than the State's international legal duties (*infra*, Chapter 3, 2.1.1).[173] Prudentialism suggests that abiding by the law (and, hence, by its interpretative methods) is only warranted in some circumstances and is a strategic choice. Last, and relatedly, the prevalence of descriptive analyses of domestic judicial interpretation of international law (*supra*, 2.1), of which Georges Scelle's 'dédoublement fonctionnel' is only one example, has distracted scholars' attention from courts' legal duties (and from other moral duties which I do not examine here).

The challenges posed by legal realism and CLS ought to be taken seriously. Even without extensive knowledge of sociology or cognitive psychology, one can expect that as an empirical matter, considerations that are independent from the legal act and its features (eg subjective preferences, socio-cultural aspects, or psychological features) do influence judicial decision-making. Attempts to downplay the influence of such factors are unconvincing. On the other hand, to stress that interpretative methods must be respected does not imply the endorsement of a counterfactual, mechanistic view of judicial decision-making. Non-evaluative conceptions of judicial decision-making (provided they have ever been endorsed at all) seem obsolete and even laughable to most lawyers today.[174] Deductive reasoning requires that the premises

170 Walter (n 118).

171 On prudentialism in US constitutional legal argument, see Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press 1982) ch 5. On its role in US foreign relations, see Curtis A Bradley and Jack L Goldsmith, *Foreign Relations Law: Cases and Materials* (3rd edn, Wolters Kluwer 2009) 42.

172 Eg Federal Council, *Botschaft zur Volksinitative 'Schweizer Recht statt fremde Richter* (*Selbstbestimmungsinitiative*)', FG 2017 5355.

173 Federal Council, *2010 Report on International and Domestic Law* (n 143), 2271 f.

174 Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12 German Law Journal 979, 985.

of the syllogism be clarified beforehand,[175] and a polity that confers legal authority upon judges gives them the power to do so. Even legal positivists whose theories are rejected by critical legal scholars in some of their aspects[176] highlight the frequent vagueness of the law, and the evaluative judgments its interpretation requires.[177]

Instead of denouncing judicial value judgments, which are a necessity, we (lawyers and scholars) should strengthen the devices by which judicial discretion is kept within reasonable bounds. The law's interpretative methods are an important safeguard in this context. They are not merely part of an efficiency calculus,[178] or a convenient way of making rulings acceptable to their addressees. Their respect, I argue, is mandated by States' international obligations. It is also required by judges' domestic legal duty to apply the law (*infra*, Chapter 5).

Scholars have scrutinized the methods used by international courts to interpret international law.[179] They have also looked at those relied upon

175 This is also acknowledged by Swiss scholars, eg Yann Grandjean, 'Le juge est-il un acteur politique ?' (2013) Aktuelle juristische Praxis / Pratique juridique actuelle 365, 369.

176 Duncan Kennedy, 'A Left/Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation', *Legal Reasoning: Collected Essays* (Davies Group Publishers 2008).

177 This position has also been endorsed by natural lawyers. See eg Samuel Pufendorf, *De jure naturae et gentium libri octo* (Clarendon Press/H Milford 1934) 818: 'laws cannot possibly foresee all cases, nor mention them, by reason of their infinite variety (Xenophon, The Cavalry Commander [ix. 1]: "To write out all that a man ought to do is no more possible than to know everything that is going to happen" (B.))'.

178 On this view, see Vermeule (n 76).

179 On the ICJ, see Eirik Bjorge, 'The International Court of Justice's Methodology of Law Ascertainment and Comparative Law' in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (Oxford University Press 2015); Talmon (n 73); Peter Tomka, 'Custom and the International Court of Justice' (2013) 13 The Law and Practice of International Courts and Tribunals: Special Issue on 'The Judge and International Custom' 195; Alberto Alvarez-Jiménez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000–2009' (2011) 60 International and Comparative Law Quarterly 681; Robert Kolb, *Interprétation et création du droit international : esquisse d'une herméneutique juridique moderne pour le droit international public* (Bruylant 2006); Sienho (n 73); Petersen (n 73). On the *ad hoc* international criminal tribunals, see Noora Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (Routledge 2014); Birgit Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International 'ad hoc' Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff 2010). On the CJEU, see Jiří Malenovský, 'Le juge et la coutume internationale : perspective de l'Union européenne et de la Cour de justice' (2013) 12 The Law and Practice of International Courts and Tribunals – Special Issue on 'The Judge and International Custom' 217; Pieter Jan Kuijper, 'The European Court and the Law of Treaties: The Continuing Story' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University

by domestic courts with regard to domestic[180] and international law. In the latter case, they have mostly used the VCLT.[181] It is worth noting that at the time this book was being finalized (June 2019), the Vienna Convention had just celebrated its fiftieth anniversary, and it had been in force for nearly forty years. However, international lawyers and scholars often consider domestic rulings on international law with suspicion. Reasons for this distrust include domestic courts' alleged lack of expertise and methodological rigor,[182] parochialism (ie, a neglect of the peculiarities of international law or even an avoidance of international legal issues),[183] judicial imperialism vis-à-vis other

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Press 2011); Ammann, 'The Court of Justice of the European Union and the Interpretation of International Legal Norms: To Be or Not to Be a "Domestic" Court?' (n 140). On the ECtHR, see Ineta Ziemele, 'Customary International Law in the Case Law of the European Court of Human Rights: The Method' (2013) 12 The Law and Practice of International Courts and Tribunals: Special Issue on 'The Judge and International Custom' 243.

180 See (for Swiss courts) Pichonnaz and Vogenauer (n 105). See also the references mentioned *supra*, 2.5.

181 Aust and Nolte (n 47).

182 Massimo Iovane, 'Domestic Courts Should Embrace Sound Interpretative Strategies in the Development of Human Rights-Oriented International Law' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012); André Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' in Gideon Boas and William A Schabas (eds), *International Criminal Developments in the Case Law of the ICTY* (Martinus Nijhoff 2003) 292.

183 Lawrence Hill-Cawthorne, 'Application of International Humanitarian Law by Domestic Courts' (*EJIL: Talk!*, 2015) <www.ejiltalk.org/application-of-international-humanitarian-law-by-domestic-courts>. See also Michael P Van Alstine, 'The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection' (2005) 93 Georgetown Law Journal 1885; Anthony Gray, 'Forum Non Conveniens in Australia: A Comparative Analysis' (2009) 38 Common Law World Review 207; Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 European Journal of International Law 159; Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 American Journal of International Law 241; Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964) 371; ILA, 'Preliminary Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61) 7; Nollkaemper, 'The Duality of Direct Effect of International Law' (n 59); Michael Waibel, 'Principles of Treaty Interpretation: Developed for and Applied by National Courts?' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016); Wood (n 14) 12; Sergei Y Marochkin and Vladimir A Popov, 'International Humanitarian and Human Rights Law in Russian Courts' (2011) 2 Journal of International Humanitarian Legal Studies 216. See also the findings (pertaining to the practice of Canadian courts) of Joshua Karton and Samantha Wynne, 'Canadian Courts and Uniform Interpretation: An Empirical Reality Check' (2013) 18 Uniform Law Review 281; Jutta Brunnée and Stephen Toope, 'A Hesitant Embrace: The Application of

States,[184] and the influence of domestic legal constraints on domestic rulings.[185] In the United States, for instance, judges and scholars often analyze international law through the lens of 'US foreign relations law'[186] and tend to obliterate the international perspective. Hence, a minority of scholars even consider that domestic rulings should not be used as 'subsidiary means for the determination of rules of [international] law' pursuant to art. 38(1)(d) ICJ Statute.[187] On the other hand, judicial reasoning can be deemed important, because, as the English Judge Cator put it with regard to the British Prize Court in Egypt, a court is 'primarily the guardian of its nation's honour and foreign countries will cite its decisions as indicating the temper of its people. An English Prize Court should certainly interpret the rules of International Law in a broad spirit rather than a narrow one'.[188] This debate shows that scholars, judges, and lawyers do express interest in – and concerns about – the methods domestic courts use to interpret international law.

International Law by Canadian Courts' (2002) XL Canadian Yearbook of International Law 3. On the parochialism of US courts, see Margaret Hartka, 'The Role of International Law in Domestic Courts: Will the Legal Procrastination End?' (1990) 14 Maryland Journal of International Law 99; Martin A Rogoff, 'Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court' (1996) 11 American University Journal of International Law and Policy 559. See however Shany, who rejects the mainstream diagnosis of domestic judicial parochialism: Yuval Shany, 'National Courts as International Actors: Jurisdictional Implications' (2009) 15 federalismi.it – Rivista di diritto pubblico italiano, comunitario e comparato 2.

184 Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law' (1990) 1 European Journal of International Law 210, 231, footnote 55.

185 ILA, 'Working Session Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61) 11; ILC, 'First Report on Formation and Evidence of Customary International Law by Special Rapporteur Sir Michael Wood' (2013) UN Doc A/CN.4/663 37, para 84. See also (with reference to the ICTY): ILC Secretariat, 'Identification of Customary International Law: The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law' (2016) UN Doc A/CN.4/691 25 f, para 41.

186 Bradley and Goldsmith (n 171).

187 Alain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 953 para 323. See also (implicitly): Gerald Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in *Symbolae Verzijl* (Martinus Nijhoff 1958).

188 David Foxton, 'International Law in Domestic Courts: Some Lessons From the Prize Court in the Great War' (2002) 73 British Year Book of International Law 261, 270. According to Foxton, this commitment to international law was merely rhetorical.

Resorting to specific interpretative methods is, of course, not a panacea. Judicial interpretations reached through flawless methods may still be illegal or – by the standards of legal argumentation – poorly reasoned (*infra*, Chapter 5). Moreover, for obvious reasons of judicial economy and practicability, domestic courts cannot engage in a detailed, textbook-like analysis of the sources of international law whenever an international legal issue arises. Yet if courts interpret international law in conformity with its interpretative methods, and in a predictable, clear, and consistent way, many of the aforementioned charges against domestic case law are rebutted.

CHAPTER 2

Terminology and Conceptual Apparatus

> Interpretation lacks sharpness. We see this lack of sharpness both in ordinary discourse and in the literature on the role of interpretation in particular domains, art criticism and legal theory among them. With rare exceptions, the concept is used as an umbrella under which a large variety of otherwise unrelated things fit comfortably. So choosing interpretation as one's focus of attention is risky. It is risky because the pressure to find order can easily lead to a manipulation of the concept with view [sic] to turning it into a tool at one's disposal.[189]

1 Introduction

Before digging into the details of the domestic judicial practice of international law, some conceptual and terminological clarifications are in order. First of all, what do lawyers – as opposed to musicians, dancers, or physicists, for example – do when they interpret? What do they mean by interpretation (2)? Second, what is judicial interpretation (3) and what is domestic judicial interpretation (4)? Third, I clarify the notion of interpretative method (5). Finally, given that the present study is concerned with the interpretation of international law, it is important to delineate what this body of law encompasses (6).

2 Legal Interpretation

Interpretation can be defined, following Andrei Marmor, as the ascription of meaning to an object[190] (the *interpretandum*). The object's meaning designates its intelligibility, ie, the features of the object that can be intellectually

189 Barradas de Freitas (n 127) 8.

190 Andrei Marmor, *Interpretation and Legal Theory* (2nd edn, Hart Publishing 2005) 25.

grasped.[191] Interpretation refers both to the process (or activity) by which meaning is attached to the object and to the result (or outcome) of this process.[192] As Timothy Endicott puts it, '[a]n interpretation is an answer to the question: "What do you make of this?" '[193]

Interpretation is by no means specific to the legal realm. We interpret when we read a novel, converse with a friend, attend a religious ceremony, look at a photograph, or try to make sense of scientific data. Comedians, psychologists, and pianists specialize in the interpretation of plays, human behavior, and musical pieces, respectively. As Raquel Barradas de Freitas highlights, the word 'interpretation' is used by 'ornithologists, scientists, anthropologists, artists, astrologers, actors, literary critics, marketing specialists, mathematicians, archaeologists, poets, chefs, musicians, chess players and lawyers'.[194] Why, then, is legal interpretation special, if at all?

Legal interpretation is different from non-legal interpretation mainly because the law (the *interpretandum*) is idiosyncratic.[195] This point may seem trivial, but it is crucial in order to understand what legal interpretation is.

The *interpretandum* of legal interpretation must be carefully defined at the outset. In and outside legal practice, we commonly talk about legal interpretation as an activity that is about *the law*.[196] We usually say that judges (and other actors) interpret the law. The title of this study also refers to the interpretation of international law. In fact, to use the word 'law' (or the notion of 'legal norm') to designate the object of legal interpretation is imprecise. Indeed, one must distinguish between the *interpretandum*, on the one hand, based on which the law is determined (ie, social facts such as the adoption of documents, the drafting of paragraphs, the conduct of parliamentary deliberations, or even brute natural facts)[197] and the law, on the other hand, ie, the legal norm that is identified through, and is the outcome of, interpretation, and which is *not* a social fact.[198] As Raquel Barradas de Freitas notes, 'legal norms (unlike legal texts)

191 Barradas de Freitas (n 127) 31.

192 See ibid 10.

193 Timothy Endicott, 'Putting Interpretation in Its Place' (1994) 13 Law and Philosophy 451, 451.

194 Barradas de Freitas (n 127) 9.

195 This is true even if many objects of legal interpretation exist, which explains why 'judicial interpretation is not defined by its object'. See ibid 193.

196 As Scott Shapiro notes, we routinely use the word 'law' in myriad ways to designate a variety of objects: Scott J Shapiro, *Legality* (Belknap Press 2011) 4 ff.

197 One example cited by Raquel Barradas de Freitas is the eruption of the volcano Eyjafjallajökull in 2010, which triggered air travel restrictions. See Barradas de Freitas (n 127) 99.

198 See ibid 186.

constitute legal meaning: they are not objects of interpretation. Legal rules and standards are not interpretable'.[199] She adds that 'anything – from the birth of a baby to a volcanic eruption, from the waving of a hand to a love letter – can potentially have legal meaning'.[200]

While some features of the law are shared by non-legal objects, others are not. The combination of these features is unique to the law and shapes the interpretation of legal acts in an idiosyncratic way. Some of the characteristics I identify in the next paragraphs presuppose the endorsement of legal positivism or of Raz's theory of authority.

First, law is an intentional object.[201] It is created by human beings in order to fulfill a particular purpose. In this respect, it is similar to other artistic objects which result from an intentional effort, but dissimilar to natural ones, such as trees, clouds, or birds, for instance – unless one endorses a teleological view of nature, as some natural lawyers do.[202] It is worth pointing out that non-intentional objects are just as interpretable as intentional ones.[203] One may think of the interpretation of the movement of clouds, of a chemical reaction, of an old stone, or of medical symptoms, for instance. Relatedly, legal interpretation differs from the interpretation of other objects because of the primary goal its interpreters pursue, namely that of identifying rights, powers, and duties.

Second, law is not only an object, but also a practice.[204] It is designed to be applied to particular cases, and it is shaped by those who participate in it, especially by its officials who enjoy legal authority and engage in legal interpretation.[205] This distinguishes legal interpretation from the interpretation of many other objects. A literary critic's interpretation of a novel, for example, does not

199 See ibid 1, 183 ff. *Contra* Panos Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 International Community Law Review 126, 128.

200 Barradas de Freitas (n 127) 185.

201 On intentionality, see Robert Stecker, *Interpretation and Construction: Art, Speech, and the Law* (Blackwell 2003) ch 1. On artefacts, see Barradas de Freitas (n 127) 83 ff.

202 Eg Robert George, 'Natural Law' (2008) 31 Harvard Journal of Law & Public Policy 171.

203 Barradas de Freitas (n 127) 23.

204 As Samantha Besson writes, '[l]aw is something people do: it is a practice. It is actually something people do together (publicly), and not only on their own: it is a social and accordingly also a political practice'. Samantha Besson, 'International Legal Theory qua Practice of International Law' in Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper, and Wouter Werner (eds), *International Law as a Profession* (Cambridge University Press 2017) 6.

205 Raquel Barradas de Freitas defines legal officials as 'people who, in virtue of their professional position, are able to act and speak on behalf of the law', Barradas de Freitas (n 127) 284.

shape the meaning of the novel in the way a court ruling does. A literary interpretation does not become part of literature.

Third, law is normative. By giving reasons for action to its subjects, it aims at guiding their behavior. Normativity is not specific to law: morality, tradition, and religion, for instance, also provide individuals with reasons for action. By contrast, the interpretation of a play or a song does not have the purpose of guiding behavior. It can enhance the understanding of the object, but the meaning it conveys is not obligatory. To be obeyed, the law must be capable of being obeyed. Some legal duties,[206] such as the legal prohibition of arbitrariness, have the purpose of ensuring that the law's subjects are indeed in a position to abide by the law's requirements.

Because courts' decisions are legally authoritative, they display the three aforementioned features: (i) they are intentional objects that carry meaning; (ii) they are part of a practice, which they shape; and (iii) they are normative and obligatory. I now turn to this category of legal interpretation, namely judicial interpretation.

3 Judicial Interpretation

In this book, I am concerned with one type of legal interpretation. I am interested in judicial interpretation, or the interpretation of laws by courts (*supra*, Chapter 1, section 4).

One of the old chestnuts of jurisprudence is whether judicial interpretation does and/or should entail a creative, lawmaking component. The controversy hinges on a deeper disagreement of lawyers and legal scholars about the proper role of courts in the domestic legal order and/or in international law.[207] In other words, there is agreement on the conceptual core of judicial interpretation, but less so about what judicial interpretations should look like. This issue is complicated by the fact that an interpretation cannot be assessed in the abstract. One must look at specific cases, which are all unique in terms of the facts and legal issues involved.

Scholars use fluctuant terminology to refer to judicial interpretation. The notions of 'application', 'identification', 'ascertainment', and 'determination', to

206 Arguably, such duties are also moral duties, yet this aspect is beyond the scope of this book. On this issue: Grant Lamond, 'The Rule of Law' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012).

207 Cass R Sunstein, 'There Is Nothing That Interpretation Just Is' (2015) 30 Constitutional Commentary 193.

name but a few, are frequently encountered in analyses of judicial interpretation. Given the central place of judicial interpretation in the present study, it is important to clarify at the outset the terminology that I am using, and why.

Judicial interpretation is the ascription of meaning to a legal act by a court (*supra*, section 2). The term 'interpretation' does not presuppose the endorsement of a specific conception of interpretation (eg interpretation as a strictly mechanistic, non-evaluative act or, at the other end of the spectrum, as an inevitably creative or 'jurisgenerative' activity, as Robert Cover has coined it).[208]

The notion of the application of the law focuses on the stage where the legal act is 'put to use'.[209] It is often employed in a way that glosses over the evaluative and law-creating character of judicial interpretation. A common statement – often made to denounce judicial activism – is that judges merely apply, but do not make law. This conception of the judiciary, which has been endorsed by domestic[210] and international[211] courts, is often associated with the doctrine of the separation of powers, which requires judges to operate as the 'mouthpiece of the law'.[212] Yet interpretation is not merely value-free application of the law (and such a view has hardly ever been defended in legal theory anyway).[213] It is inevitably evaluative. Of course, there is little incentive for courts to openly acknowledge the evaluative judgments their activity requires them to perform, as this candor might undermine their institutional (sociological) legitimacy. This is especially the case in jurisdictions that lack a doctrine of binding precedent (on Switzerland, see *infra*, Chapter 3, 4.2.7), as opposed to jurisdictions where judicial decisions are, under certain conditions, sources of law.

208 Robert M Cover, 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4, 11 ff. See also Ingo Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation' (2011) 34 Loyola of Los Angeles International and Comparative Law Review 99.

209 See the definition of 'application' in <www.merriam-webster.com/dictionary/application>.

210 In the United States: *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), at 177; *United States v. Butler*, 297 U.S. 1 (1936), at 62 f.

211 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion, 8 July 1996, ICJ Reports 1996, 226, at 237, para 18.

212 Montesquieu, *De l'esprit des lois* (Garnier 1868) 149.

213 One author endorsing this position is John Maxcy Zane, see Scott Brewer, 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy' (1996) 109 Harvard Law Review 923, 943, footnote 59.

While every application of the law requires interpretation,[214] not every law-applying act raises salient and difficult interpretative issues. Moreover, legal interpretation is not necessarily conducted with a view to applying the law, as advisory opinions illustrate.[215] Finally, it must be added that the application of the law is not the monopoly of the judiciary, since law-applying authorities include both courts and executive (or administrative) authorities.

A related notion that must be distinguished from legal interpretation is enforcement, ie, the act through which the rights and duties of legal subjects are pointed out. Contrary to what is often assumed, coercion is not a necessary feature of enforcement. As Samantha Besson notes, courts are not always involved in the coercive enforcement of their own judgments, yet their interpretations contribute to enforcing the law.[216] Enforcement logically takes place after the law has been interpreted. Relatedly, obedience (or the synonymous terms of respect, abidance, adherence, or compliance) with the law is only possible if the meaning of the law (and hence the content of the obligation) is reasonably precise. Another term that is often employed as a synonym for enforcement is implementation, although one could use 'implementation' in a more specific way to designate compliance with the law by the law's subject(s), as Antonios Tzanakopoulos and Eleni Methymaki suggest. Enforcement, by contrast, is typically performed by other actors than the law's addressees (although these other actors may be under the obligation to respect this law as well).[217]

Notions such as identification, ascertainment, and determination connote the active, law-creating dimension of interpretation. They suggest that the meaning of the *interpretandum* needs to be discovered, unveiled, or recognized, as if interpretation were an archaeological exercise.[218] These terms also

214 Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' (n 85) 420; Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 1991) 207 f. Schauer's notion of law application includes cases in which the law's subjects *follow* the law.

215 On this point, see 'Article 19. Interpretation of Treaties' (n 121) 938 f.

216 Samantha Besson, 'International Judges as Dispute-Settlers and Law-Enforcers: From International Law Without Courts to International Courts Without Law' (2011) 34 Loyola of Los Angeles International and Comparative Law Review 33, 37 f.

217 Antonios Tzanakopoulos and Eleni Methymaki, 'Sources and the Enforcement of International Law: Domestic Courts – Another Brick in the Wall?' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 6, 9.

218 Ingo Venzke, 'Semantic Authority, Legal Change and the Dynamics of International Law' (2015) 12 No Foundations 1, 1.

reflect the fact that this meaning needs to be actively defined, that reasons must be offered to justify why the *interpretandum* means X. Duncan Hollis for instance considers that interpretation performs an 'existential function' in international law regardless of the source at stake.[219] This dimension of the interpretative process can be compared to what Ronald Dworkin, in domestic legal theory, calls the pre-interpretive stage.[220] Hollis's conception of interpretation is convincing to the extent that it also takes into account the aspect of content-determination, even if existential interpretation is always 'lurking in the background', as he puts it.[221] In this vein, Jean d'Aspremont differentiates between 'law ascertainment' (ie, the identification of the legal act) and 'content determination' (the identification of its content or meaning).[222] This distinction is compelling if these two dimensions of interpretation are not seen as mutually exclusive, but complementary and often intermingled in practice, as d'Aspremont himself acknowledges,[223] especially with regard to unwritten law.[224] The aforementioned three terms (identification, ascertainment, and determination) are often used in relation to unwritten international law. The ILC's work on custom refers to the 'identification of customary international law',[225] as do scholars interested in the issue.[226] Scholars mostly use the notion of 'determination' to refer to CIL,[227] though they occasionally resort to it in connection with international legal acts in general.[228] The notion of 'ascertainment' is less

219 Duncan B Hollis, 'The Existential Function of Interpretation in International Law' in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015). See also Duncan B Hollis, 'Sources in Interpretation Theories: An Interdependent Relationship' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017).

220 See Hollis, 'Sources in Interpretation Theories: An Interdependent Relationship' (n 219) 4; Dworkin (n 77) 65 f.

221 Hollis, 'Sources in Interpretation Theories: An Interdependent Relationship' (n 219) 6.

222 Jean d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished' in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (Cambridge University Press 2015).

223 See ibid 118.

224 Jean d'Aspremont, 'The International Court of Justice, the Whales, and the Blurring of the Lines Between Sources and Interpretation' (2016) 27 European Journal of International Law 1027, 1041.

225 See <legal.un.org/ilc/guide/1_13.shtml>; Besson and Ammann (n 60).

226 Alvarez-Jiménez (n 179); Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press 2016). On these notions: Besson and Ammann (n 60) 7–9.

227 Talmon (n 73); Stirling-Zanda (n 102).

228 d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished' (n 222).

frequently employed.[229] It pervades Jean d'Aspremont's monograph on the 'ascertainment of legal rules'.[230]

Many scholars are reluctant to refer to the 'interpretation' of customary (international) law, presumably because it is vaguer than written law (which is fixed on a physical medium). Thus, judicial decision-makers arguably have to play a more active part in interpreting it. However, another reason for this reluctance to talk about 'interpretation' is that interpretation is erroneously associated with textual material. Yet interpretation, *qua* inquiry into the meaning of a legal act, allows us to identify written and unwritten laws alike. Moreover, all laws, written or unwritten, leave room for indeterminacy (*infra*, Chapter 5, 4.1). Finally, the identification of a legal act (ie, the dimension of law ascertainment) coexists with the identification of its meaning, be it a written legal act or not.

In the present analysis, I predominantly refer to the notion of 'interpretation', at least as regards written international law. For unwritten international law, the use of terms such as 'identification', 'determination', and 'ascertainment' is common and seems appropriate, as these notions denote the greater involvement of the judiciary (and of other authorities) in establishing the existence of the law compared to what is the case with regard to written law. However, it is important to stress that in all these cases, the same operation – namely interpretation[231] – is at stake.[232]

Interpretation is conceptually distinct from the formation of the law (ie, the process of its creation), even if both can overlap in practice (see especially

229 Cedric MJ Ryngaert and Duco W Hora Siccama, 'Ascertaining Customary International Law: An Inquiry Into the Methods Used by Domestic Courts' (2018) 65 Netherlands International Law Review 1.

230 Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011).

231 On the interpretability of custom, see the dissenting opinion of Judge Tanaka in ICJ, *North Sea Continental Shelf* (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*), Judgment, ICJ Reports 1969, 3, at 181; ILA, 'Preliminary Report of the ILA Study Group on the Content and Evolution of the Rules of Interpretation' (2016) 8 <www.ila-hq.org/index.php/study-groups>; Hollis, 'Sources in Interpretation Theories: An Interdependent Relationship' (n 219); Panos Merkouris, 'Interpretation of Customary International Law: The Rules of the Game' (*Oxford Public International Law Discussion Group*, 2016) <www.law.ox.ac.uk/research-subject-groups/graduate-discussion-group-index/public-international-law-discussion-group-0>; Merkouris (n 199).

232 ILA, 'Preliminary Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61) 9.

Chapter 3, 4.2.7, and Chapter 4, 3., *infra*, on the domestic and international legal effect of domestic rulings, respectively).

4 Domestic Judicial Interpretation

This study deals with a specific type of judicial interpretation, ie, legal interpretation as practiced by domestic courts (see also *supra*, Chapter 1, section 5).

A domestic court (or judicial body) is a permanent institution established by the law of a particular State and legally tasked with resolving legal disputes in a way that, unless the decision is appealed, is authoritative for the domestic legal order.[233] Domestic laws (but also many of States' international obligations) usually require that courts resolve such disputes in an impartial, independent fashion, by providing reasons for their decisions, and that their decisions can in principle be appealed to a higher domestic judicial body (eg *infra*, Chapter 3, section 4, regarding the Swiss judiciary). These decisions can sometimes also be challenged before an international court. As mentioned (*supra*, Chapter 1, section 5), domestic courts, unlike international ones, interpret international *and* domestic law, in the latter case either in its 'original' form (in monist States) or in its domesticated form (in dualist States).

International courts, by contrast, are established by laws created by several States (and, in many cases, under the auspices of an IO). They are legally tasked with resolving legal disputes in a way that is authoritative[234] for their parties. As previously noted (*supra*, Chapter 1, section 5), international courts have a limited jurisdiction, and they cannot in principle interpret domestic law. The PCIJ has famously considered that '[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures'.[235] Similarly, the ICJ has held that

233 The ILC Secretariat defines domestic courts as 'all judicial organs exercising their functions within the domestic legal order, regardless of their position in the national system'. See ILC Secretariat, 'Identification of Customary International Law: The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law' (n 185) 3 para 4.

234 Of course, the modalities of this legal authority and the means deployed to achieve compliance with decisions of international courts vary greatly.

235 PCIJ, case concerning *Certain German Interests in Polish Upper Silesia*, merits, judgment No 7, PCIJ Series A No 7, 25 May 1926, 4, at 19. See also the individual opinion of Judge Anzilotti in PCIJ, case concerning the *Consistency of Certain Danzig Legislative Decrees*

'it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts'.[236]

Sometimes, the application of domestic law by these international courts is inevitable,[237] eg when the State's compliance with international law needs to be appraised,[238] or when a given issue is governed by domestic law, like the law of nationality, corporate law, or migration law. Although the PCIJ has generally endeavored to stick to the interpretation of domestic law as defined by domestic courts, unless this interpretation was 'uncertain or divided',[239] the Court has, as Jean d'Aspremont shows, interpreted domestic law autonomously in a series of cases.[240] Similarly, while the ICJ defers to the national authorities with regard to the interpretation of domestic law unless an interpretation is 'manifestly incorrect',[241] this has not prevented it from finding that the domestic authorities had failed to act in accordance with domestic law in several cases.[242]

When contrasting international and domestic courts, it is also worth noting that from the perspective of international law, the legal authority of international courts has a wider scope than that of domestic courts, as international rulings can bind multiple States. A single domestic ruling, by contrast, is not a source of international law and, hence, cannot bind another State.

With the Constitution of the Free City, advisory opinion, PCIJ Series A/B No 65, 4 December 1935, 60, at 61 f, para 2.

236 ICJ, case concerning *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), merits, judgment, ICJ Reports 2010, 639, at 665, para 70. See also Philip V Tisne, 'The ICJ and Municipal Law: The Precedential Effect of the Avena and Lagrand Decisions in U.S. Courts' (2005) 29 Fordham International Law Journal 865, 907.

237 PCIJ, case concerning the *Payment in Gold of Brazilian Federal Loans Contracted in France*, judgment No 15, PCIJ Series A No 21, 12 July 1929, 93, at 124.

238 PCIJ, case concerning *Certain German Interests in Polish Upper Silesia*, merits, judgment No 7, PCIJ Series A No 7, 25 May 1926, 4, at 19.

239 PCIJ, case concerning the *Payment in Gold of Brazilian Federal Loans Contracted in France*, judgment No 15, PCIJ Series A No 21, 12 July 1929, 93, at 124.

240 See Jean d'Aspremont, 'The Permanent Court of International Justice and Domestic Courts: A Variation in Roles' In Malgosia Fitzmaurice and Christian J Tams (eds), *Legacies of the Permanent Court of International Justice* (Martinus Nijhoff 2013) 231 ff.

241 ICJ, case concerning *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), merits, judgment, ICJ Reports 2010, 639, at 665, para 70.

242 Ibid, at 666, para 73.

5 Methods of Interpretation

A method is a way of doing something.[243] Methods of legal interpretation are ways of ascertaining laws. The use of some methods is legally required. It is on these methods, and on the legal norms that require their use, that I will focus in the following paragraphs.

It is important to distinguish the concept of (legally required) interpretative methods from related concepts (*infra*, 5.1–5.5). The notion of method is, indeed, used loosely and inconsistently in legal practice and scholarship. As a result, lawyers and legal scholars often talk at cross-purposes when they argue about interpretative reasoning. Thus, conceptual clarity is needed.

While they are often conflated in practice, legal norms that require the use of specific interpretative methods must be distinguished from normative interpretative theories (5.1), axiological and structural interpretative principles (5.2), rules (5.3), auxiliary means (5.4), and argument types (5.5). I use the term 'interpretative methods' interchangeably with interpretative canons, maxims, guidelines, and principles (except for axiological or structural principles, *infra*, 5.2). A canon is an accepted normative principle.[244] A maxim is a fundamental principle of conduct.[245] Finally, a guideline is an indication or outline of policy or conduct.[246]

5.1 *Normative Interpretative Theories*

Legal norms that require the use of interpretative methods, eg textual or teleological interpretation, are not normative interpretative theories (or methodologies) such as textualism or purposivism. Methods are conceptually distinct from what Olivier Corten calls 'objectivist' versus 'voluntarist' theories, which demand that laws be interpreted either separately from, or based on, the intention of their authors.[247] They are distinct from deontological versus utilitarian interpretative theories, which hinge on the moral philosophy the interpreter endorses. They also differ from what, in international law, is called 'restrictive

243 As mentioned (*supra*, Chapter 1, section 7), a method is a 'systematic procedure, technique, or mode of inquiry employed by or proper to a particular discipline or art', ie, a reasoned, ordered process. See <www.merriam-webster.com/dictionary/method>.

244 See the definition of 'canon' in <www.merriam-webster.com/dictionary/canon>.

245 <www.merriam-webster.com/dictionary/maxim>.

246 <www.merriam-webster.com/dictionary/guideline>.

247 Olivier Corten, 'Les techniques reproduites aux articles 31 à 33 des Conventions de Vienne : approche objectiviste ou approche volontariste de l'interprétation ?' (2011) 115 Revue générale de droit international public, Dossier : Les techniques interprétatives de la norme internationale 351.

interpretation', a theory requiring that international law be interpreted so as to least interfere with a State's sovereignty.[248]

Normative interpretative theories mandate giving priority to a specific aspect of the *interpretandum*, such as its wording or drafting history, or so as to produce a particular result. They do not require that their users develop an elaborate normative framework: their endorsement is often implicit in judicial practice. Just like methods, normative interpretative theories exist in domestic and international law.[249]

Legal norms that prescribe the use of certain methods, by contrast, demand that decision-makers ascertain the law based on some features of the *interpretandum*. However, although there are categorical reasons for using these specific methods, interpretative norms do not typically provide categorical reasons for action.[250] In other terms, norms requiring the use of specific methods do not provide a meta-principle that directs how to choose among the different directions in which various methods point. They merely mandate using some features of the *interpretandum*.

5.2 *Structural and Axiological Interpretative Principles*

Interpretative norms are a subcategory of legal principles. Principles are mandatory norms governing the interpretation of other legal acts, and are drafted at a relatively high level of generality and abstractness. A principle 'states a reason which argues in one direction, but does not necessitate a particular decision'.[251] While principles do not prescribe the outcome of a case, they orient and therefore constrain interpretative reasoning. Principles can be defeated by other, incompatible principles, provided there are good reasons for which these other principles must prevail.

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248 On restrictive interpretation, see Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21 European Journal of International Law 681; Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 British Yearbook of International Law 48; Rogoff (n 183) 607 ff. For a rejection of this theory, see ICSID, *Aguas del Tunari SA v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, ICSID Case No ARB/02/3, 21 October 2005, at para 91.

249 Joost Pauwelyn and Manfred Elsig for instance note that international courts interpret treaties based on a 'dominant hermeneutic'. See Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press 2013).

250 Eg Murphy (n 84) 32.

251 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 26.

Norms prescribing the use of interpretative methods must be distinguished from another subcategory of principles, namely structural and axiological principles. These principles encapsulate a form of political organization or a value that judges must take into account when interpreting the law. In domestic law, such principles include the constitutional principles of proportionality, subsidiarity, and equality.[252] In international law, structural and axiological principles can (but need not) qualify as general principles of international law. They include the principle of good faith, for instance, which is a general principle in the sense of art. 38(1)(d) ICJ Statute, and the principle of complementarity,[253] which is not a general principle of international law.

Contrary to norms on interpretative methods, which point to features of the law that decision-makers must rely on, structural and axiological principles provide criteria that interpreters must use when choosing among different possible interpretations.

5.3 *Rules*

In practice, norms prescribing the use of interpretative methods are often called 'rules'. This is likely due to the fact that the use of methods is required by legal norms, which include rules.[254] However, the two concepts are distinct.

Legal rules define what conduct is legally permissible. Once the facts have been established, legal rules can be applied to them in a syllogistic fashion.[255] Although rules, like every legal act, are open-textured and can thus become vague in particular cases, they allow for deductive reasoning once they have been interpreted. Examples of interpretative rules include conflict rules (eg *lex specialis* or *lex posterior*) and rules of logic (eg *a fortiori* or *ejusdem generis*; on argument types, see *infra*, 5.5).[256]

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252 Eg in Switzerland, the constitutional principle of the rule of law (art. 5 Cst.) or the constitutional principle of subsidiarity (art. 5a Cst.).

253 Art. 17 ICC Statute.

254 Art. 31 VCLT for instance is entitled 'general rule of interpretation'. *Contra* Klabbers, 'Virtuous Interpretation' (n 93).

255 Hart and Sacks (n 155) 155.

256 Robert Kolb refers to such rules of logic as 'arguments' lawyers use for interpretative purposes: Robert Kolb, 'Is There a Subject-Matter Ontology in Interpretation of International Legal Norms?' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 475. For a detailed analysis of a range of such rules (labelled 'canons and principles'), see Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2018).

Norms that prescribe the use of interpretative methods, by contrast, can seldom (if at all) be applied deductively. They are not 'iron-clad rules'[257] that determine the outcome of judicial interpretation. Instead, they point to relevant features of the *interpretandum* that decision-makers must take into account, and they require inductive reasoning (eg to determine the context or legislative history of a legal act).

5.4 *Auxiliary Means*

Auxiliary means assist decision-makers in ascertaining the law. They are not sources of law, but material that helps interpreters in the identification of the law. In other words, auxiliary means are distinct from elements which (objectively) contribute to the formation and evolution of the law, even if they can influence these processes. One example of auxiliary means, under Swiss law, is 'established doctrine and case law',[258] which Swiss judges must follow when filling gaps.

Norms that mandate the use of interpretative methods and auxiliary means are related. Auxiliary means may be necessary in order to use a given method. A judge may for example need to consult auxiliary means to identify the object and purpose or legislative history of a domestic statute or treaty. Moreover, methods, like auxiliary means, assist interpreters in ascertaining the law. However, unlike methods, auxiliary means are not features of the law that judges must take into account when interpreting it. Instead, they help decision-makers in their interpretative task.

5.5 *Argument Types*

A last distinction concerns norms prescribing the use of interpretative methods, versus what Scott Brewer calls argument types, ie, patterns of reasoning. Scott Brewer lists four basic argument types: deduction, induction, analogy, and inference to the best explanation (or abduction).[259]

Scholars often refer to the inductive versus deductive method, and some have analyzed the practice of international law through the lens of such argument types.[260] The notion of method I refer to in this study is distinct from argument types, however. Indeed, a given method can be deployed through

257 'Article 19. Interpretation of Treaties' (n 121) 947.

258 Art. 1(3) SCC.

259 Brewer (n 213) 942 ff.

260 Eg Talmon (n 73). See also Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 751.

various argument types. An argument type does not tell judicial decision-makers to which features of the law they must attend. Instead, it determines the logical structure their reasoning must adopt.

6 The Interpretation of International Law

This book deals with the interpretation of international law. It is therefore essential to clarify the notions of 'international legal act' (the *interpretandum*) and 'international law' (the result of the interpretation of an international legal act). As previously noted (*supra*, section 2), 'law' and 'legal act' are distinct concepts, even if the term 'law' is often used loosely to designate the legal act (the interpretative object).

The present study primarily looks at the interpretation of *public* international law. I hence often use the term 'international law' as shorthand for 'public international law'. Public international law, defined narrowly, designates the set of norms resulting from legal acts that govern interstate relations. Yet in contemporary scholarship and international legal practice, the term is employed more broadly to refer to norms resulting from legal acts that govern the relations between different subjects of international law, the behavior of international legal subjects within their jurisdiction and, sometimes, the behavior of individuals.[261] The bottom line is that these norms are the result of international lawmaking processes, ie, processes involving the organs of more than one State.

Private international law, on the other hand, is the body of domestic and international legal norms that determine the legal rights and duties of individuals in situations with a cross-border dimension. It addresses issues such as the jurisdiction of domestic courts, the applicable law, and/or the conditions for the recognition and enforcement of foreign judgments in such cases.[262] André Nollkaemper notes that looking at private international law cases where 'the interests of the state are not as immediately involved as they are in public law cases that challenge governmental power alters the stakes dramatically'.[263]

While public international law is my primary focus, the claims I defend in this book – namely that domestic courts must take the interpretative methods

261 See the definitions listed in Besson, *Droit international public : Abrégé de cours et résumés de jurisprudence* (n 89) 2.

262 See for instance art. 1 of the Federal Act on Private International Law of 18 December 1987 (SR 291).

263 Nollkaemper, 'The Duality of Direct Effect of International Law' (n 59) 109.

of international law more seriously, and that they must strive to reason predictably, clearly, and consistently – apply to public and private international law alike. An in-depth study of Swiss courts' rulings on private international law[264] (and the extent to which private international law raises distinctive interpretative issues) is beyond the scope of my project, though these rulings have been taken into account in the overview and evaluation of the Swiss practice (*infra*, Chapters 7 and 8).

International law is law.[265] Hence, it could be argued that the interpretation of international law shares the features of the interpretation of *domestic* law. Indeed, international and domestic law tend to overlap not only in terms of their respective subject matters, but also as regards the authorities that apply them (in most cases, domestic authorities, including courts, see also *supra*, Chapter 1, section 5). However, as previously emphasized (*supra*, Chapter 1, section 6), international law differs from domestic law in one important respect, namely with regard to the characteristics of (and especially the actors involved in) international lawmaking. Art. 38 ICJ Statute, which, in the practice of international law, is taken to have customary status, lists three sources of international law, ie, treaties, CIL, and general principles. Judicial decisions and scholarly writings, by contrast, are not sources, but 'subsidiary means' (art. 38(1)(d) ICJ Statute), what I call auxiliary means (*infra*, Chapter 4, 3.2). I analyze the place of domestic judicial decisions from the perspective of art. 38 ICJ Statute in Chapter 4 (*infra*).

Contrary to the processes through which domestic law is created, which involve the State's legislative branch (and, to an extent that varies from one legal

264 On this issue, see Cashin Ritaine (n 101); Niklaus Meier, 'Auslegungseinheit von LugÜ und EuGVVO unter besonderer Berücksichtigung der Schweizer Beteiligung am Vorabentscheidungsverfahren vor dem EuGH' (2012) 22 Schweizerische Zeitschrift für internationales und europäisches Recht / Revue suisse de droit international et de droit européen 633; Andreas Bucher, 'Que devient le droit (civil) international au Tribunal fédéral ?' Jusletter of 8 May 2017.

265 Hart (n 78) 216 ff; Hans Kelsen, 'Lecture III: International Law and the State', *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940–41* (Harvard University Press 1942). *Contra* John Austin, *The Province of Jurisprudence Determined* (John Murray 1832). See also Anthony D'Amato, 'Is International Law Really "Law"?' (1984) 79 Northwestern University Law Review 1293. For a more recent piece on the topic, see Frédéric Mégret, 'International Law as Law' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012). While defending the truth of the proposition that 'international law is law' is beyond the scope of this study, international law can be characterized as law because it is (i) an intentional object, (ii) a practice, and (iii) normative and obligatory (*supra*, section 2).

order to the other, the State's executive and judicial branch), international lawmaking processes typically and primarily take place through the participation of the organs of various States (which, in some cases, act in the framework of an IO).[266] The interpretation of international law therefore requires looking beyond one particular jurisdiction, eg when courts inquire into the *travaux préparatoires* of a treaty or into the ordinary meaning of its text, but also when they ascertain unwritten international law.

In recent years, some scholars have criticized the 'placative confidence' with which most participants in the practice of international law approach the question of what the sources of international law are (ie, their often uncritical reliance on art. 38 ICJ Statute).[267] A number of authors have tried to provide a broader concept of international lawmaking than the usual reference to art. 38 ICJ Statute,[268] eg by highlighting that this provision is not exhaustive.[269] Harold Koh has developed the notion of 'transnational legal process'[270] to emphasize the multifaceted nature of international legal practice. It is indeed important to acknowledge the existence of 'informal' international lawmaking[271] and what Prosper Weil, in a seminal article published in the early 1980s, called the 'relative normativity' of international law (and especially the fact that international law includes *jus cogens* but also – according to some authors – soft law).[272] For reasons of scope, and given the numerous non-state actors that influence the formation and evolution of international law, this study focuses on the formal sources of international law listed in art. 38 ICJ Statute. It does not

266 As Samantha Besson notes, what distinguishes international law and domestic law are their respective sources, see Besson, 'Theorizing the Sources of International Law' (n 151) 167.

267 See ibid 164.

268 Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007); Joost Pauwelyn, Ramses A Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012).

269 Arajärvi (n 37) 30.

270 The term designates 'the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law'; Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 Nebraska Law Review 181, 183 f.

271 Rüdiger Wolfrum, 'Sources of International Law', *Max Planck Encyclopedia of Public International Law* (*Online Edition*) (Oxford University Press 2011) para 10 <opil.ouplaw.com>. Wolfrum accepts the existence of other sources beyond those listed in the ICJ Statute.

272 Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 American Journal of International Law 413.

look at processes that influence international lawmaking without qualifying as formal sources or auxiliary means.

The notion of international law used in this book – and in the bulk of contemporary international and EU legal scholarship[273] – does not encompass EU law. While what today is called the EU was created through a network of international treaties, its Court of Justice soon clarified that these treaties had created a legal order of its own. The EU is reluctant to embrace the categories of international law, and the law that governs its legal order belongs to a regime *sui generis*. However, Switzerland is tied to the EU through several bilateral treaties, which are taken into account in this book.[274]

273 On the (ambivalent) relationship between the EU and international law, see Samantha Besson and Nicolas Levrat (eds), *L'Union européenne et le droit international / The European Union and International Law* (Schulthess 2015).

274 Of course, the fact that the EU is not a State, but a new legal order of international law may have implications for the way agreements with the EU must be interpreted. On this issue, see Besson and Ammann (n 97).

CHAPTER 3

Interpreting International Law in Context – Domestic Specificities

> What I am convinced of is the need to start with some particularization. I don't find myself at all convinced when people start out claiming they can tell us about judging without some grounding in a specific imagined situation.[275]

> [T]he interpretation of international law is culturally sensitive and needs to be analysed in light of the legal, political and social contexts of the different domestic legal orders.[276]

1 Introduction

In this chapter, I highlight several characteristics of the Swiss legal order that deserve emphasis for the purposes of this study.[277] These characteristics fall into three categories. A first cluster of features pertains to the relationship between the Swiss State and international law (2). It encompasses the characteristics, principles, and goals of Swiss foreign relations law and policy (2.1), and the way the Swiss legal order regulates its relationship with international law (2.2). I then highlight a series of principles of political organization that govern the Swiss State (3): federalism (3.1), linguistic diversity (3.2), the rule of law (3.3), semi-direct democracy (3.4), and legislative supremacy (3.5). Third, I focus on the structure, organization, and functioning of the Swiss judiciary (4), before concluding (5).

As stated at the outset (*supra*, Chapter 1, section 3), I do not look at the interpretation of international law by domestic courts *in abstracto*. I focus on

275 Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (n 75) 45.
276 Aust and Nolte (n 47) v.
277 Many characteristics mentioned in this chapter have originally been identified in Besson and Ammann (n 60).

a given institutional and domestic legal context,[278] and on how courts have decided specific cases. Refraining from focusing on a specific domestic judiciary and on individual cases would lead to an analysis that lacks substance. It would also make it difficult to provide a thorough, reasonably comprehensive, and nuanced account of the challenges and constraints domestic courts face. International law is designed to be implemented in domestic legal orders, which differ in terms of their legal, institutional, and political structures. It would be artificial to sever the domestic case law from the context in which it is nested. Jurisdiction-specific approaches to international law in domestic courts have been widely adopted by international legal scholars,[279] and the blending of such approaches with the methods of comparative law has even given birth to a field of its own: 'comparative international law'.[280]

Highlighting the specificities of the Swiss legal order that are significant for an analysis of the Swiss judicial practice of international law has several aims. First, as Duncan Kennedy puts it, these idiosyncrasies are part of the legal 'material' with which Swiss courts have to 'work' when applying international law domestically.[281] Disentangling this domestic 'thicket'[282] makes it possible to identify some of the legal (and other) reasons for which Swiss courts interpret international law in a given way.[283] Second, domestic law must be factored into any normative appraisal of domestic judicial practices. Third, the present list is also a preliminary step to mapping the Swiss judicial practice of international law through empirical work.[284] Fourth, and importantly, this chapter sets the

278 Etymologically, 'context' points to what is weaved together (from *con-*, with, and *-texere*, to weave). A contextual approach aims at *disentangling* a set of circumstances that are knit together and form the background of an issue or activity.

279 Sloss (n 120); Aust and Nolte (n 47); August Reinisch, *International Organizations Before National Courts* (Cambridge University Press 2000).

280 Roberts and others (n 8). See also Mathias Forteau, 'Comparative International Law Within, Not Against International Law: Lessons From the International Law Commission' (2015) 109 American Journal of International Law 498. While I do not engage in a comprehensive comparative legal analysis, I will refer to the practices of courts in other States to put the Swiss case law into perspective (see Chapters 7 and 8, *infra*).

281 Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (n 75).

282 Carter and Weiner (n 89) 150.

283 On the importance of this question, see Manuel J Ventura, 'Book Review: Sharon Weill, The Role of National Courts in Applying International Humanitarian Law' (2016) 14 Journal of International Criminal Justice 744. On the US historical context, for example, see Bradley and Goldsmith (n 171) ch 1; David L Sloss, Michael D Ramsey, and William S Dodge (eds), *International Law in the U.S. Supreme Court: Continuity and Change* (Cambridge University Press 2011).

284 Ammann, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (n 5).

stage for the argument that guides this entire study. As will become apparent, several features of the Swiss legal order explain why the Swiss judicial practice of international law has been predominantly outcome-oriented, anti-theoretical, and deferential towards other branches of government. Yet if Swiss courts are to interpret international law – as opposed to doing something else that does not qualify as such – they must strive to bring their practice into conformity with the interpretative methods of international law, and they must offer predictable, clear, and consistent reasoning in support of their conclusions.

Several caveats apply to this chapter. First, I predominantly flesh out the *legal* characteristics of the Swiss legal order. Of course, myriad extra-legal peculiarities (be they sociological,[285] psychological,[286] or anthropological,[287] to name but a few examples) explain the domestic judicial practice of international law from an 'external'[288] vantage point and deserve attention. For reasons of scope and expertise, I take these other approaches into account only at the margins. However, the line between 'legal' and 'extra-legal' features is not a sharp one, as providing insights into Swiss judges' 'internal point of view'[289] requires looking beyond legal provisions to analyze the way participants in legal practices think, talk, and argue about the law. Hence, I also include aspects that are not strictly 'legal' (in the sense of being provided for under Swiss law) but that shed light on the Swiss case law.

Second, while I believe to have included what are, for the purpose of this study, noteworthy features of the Swiss legal order, I have certainly not exhausted all the legal characteristics that define the Swiss judicial practice of international law and distinguish it from that of other domestic courts. Additional features include procedural law, for instance, or areas of domestic law that have no obvious connection to international law, but are relevant to a given case.

Third, the facets I highlight should not be considered in isolation. Quite to the contrary, they are likely to influence each other.

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285 Simone Rau and Barnaby Skinner, 'Das sind die härtesten Asylrichter der Schweiz' (*Tagesanzeiger*, 2016) <blog.tagesanzeiger.ch/datenblog/index.php/12556/je-nach-richter-dreimal-hoehere-erfolgschancen>.

286 Hänni (n 75).

287 Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108 American Anthropologist 38.

288 On external approaches in legal scholarship, see McCrudden (n 7). On the relationship between these approaches and international law, see Besson, 'International Legal Theory qua Practice of International Law' (n 204).

289 Hart (n 78) 82 ff.

Lastly, the significance of the domestic legal context does not mean that domestic courts are not, or must not, be guided by international law, which is the main focus of this study. From the perspective of international law, domestic law cannot in principle justify a State's violation of its international obligations.[290] The international legal framework that governs domestic courts' interpretation of international law is analyzed in more detail in Chapters 4 and 6 (*infra*).

2 The Swiss State and International Law

A first cluster of legal specificities that deserves emphasis concerns the relationship between the Swiss State and international law. The goals, principles, and characteristics of Swiss foreign relations law (2.1), and the status, rank, and direct effect of international law in the Swiss legal order (2.2) all constrain Swiss courts' adjudication of international legal issues.

2.1 *Swiss Foreign Relations Law*

Foreign relations law is the body of legal acts that defines the relationship of a State (or of another subject of international law) with other international legal subjects, as well as the rights, duties, and powers of international legal subjects in this context. It must be distinguished from the State's foreign policy, which is primarily driven by strategic, as opposed to legal, considerations (though legal aspects will often be of great importance). In practice, foreign relations law and foreign policy are intermingled: policy goals are achieved through law, which constrains and enables policy, and which defines its general orientation.

What is the relevance of foreign relations law for domestic courts' interpretation of international law? A State's foreign relations law determines the type of international legal issues that can be brought before its courts, and it constrains the way in which courts can resolve such issues. It can also make this State 'specially affected'[291] by specific international legal acts[292] (besides other

290 Art. 27 VCLT.

291 ICJ, case concerning the *North Sea Continental Shelf* (*Germany v. Denmark; Germany v. Netherlands*), merits, judgment, ICJ Reports 1969, 20 February 1969, 3, at 42 f, para 73 f. See also ICJ, case concerning the *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion, ICJ Reports 1996, 8 July 1996, 226, at 253 f, para 65.

292 Eg States that have concluded specific treaties, are nuclear powers, or are engaged in an international armed conflict.

factors, eg geography).[293] While some reject the concept of 'specially affected States' due to sovereign equality and States' interconnectedness,[294] others contend that if a State is particularly exposed to specific international legal issues, particular weight should be conferred to its practice and *opinio juris* for the purposes of ascertaining CIL.[295] In any case, whenever a State is one of the few (or even the only one) to have faced a given international legal issue, its practice will likely be taken into account by other States to determine what international law requires.[296]

In this subsection, I first highlight the general characteristics of Swiss foreign relations law (2.1.1), before focusing on the domestic separation of powers in foreign relations (2.1.2).

2.1.1 Swiss Foreign Relations Law in General

The Swiss Constitution states that in its foreign relations, the federal State 'shall ensure that the independence of Switzerland and its welfare is safeguarded' and 'assist in the alleviation of need and poverty in the world and promote respect for human rights and democracy, the peaceful coexistence of

293 For an example: Bernard H Oxman, 'Some Observations on the Draft Conclusions on Identification of Customary Law Provisionally Adopted by the ILC's Drafting Committee at the Sixty-Sixth Session' (2014) AJIL Unbound <www.asil.org/blogs/some-observations-draft-conclusions-identification-customary-law-provisionally-adopted-ilc%25E2%2580%2599s>.

294 Dissenting opinion of Judge Shahabuddeen in ICJ, case concerning the *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion, ICJ Reports 1996, 8 July 1996, 375, at 414; dissenting opinion of Judge Weeramantry in ibid 429, at 536. The concept was initially included, but later removed from the ILC's draft conclusions on CIL. Compare the following reports: ILC, 'Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (2015) UN Doc A/CN.4/682; ILC, 'Fourth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (2016) UN Doc A/CN.4/695. See also UN General Assembly, *Report of the ILC, 67th session (4 May – 5 June and 6 July – 7 August 2015)*, UN Doc A/70/10, 44, para 82.

295 ICJ, case concerning the *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion, ICJ Reports 1996, 8 July 1996, 226, at 253 f, para 65. Some States emphasized the practice and *opinio juris* of 'those [States] who possess [nuclear] weapons' to suggest the existence of CIL prohibiting the threat or use of nuclear weapons. See also ILC, 'Fifth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (2018) UN Doc A/CN.4/717 29 ff para 64 ff.

296 One example is the *Pinochet* litigation in the House of Lords. See ILC, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Fragmentation of International Law' (2006) UN Doc A/CN.4/L.682 para 187 at 371. For a critique, see Ingrid Wuerth, 'Pinochet's Legacy Reassessed' (2012) 106 American Journal of International Law 731.

peoples as well as the conservation of natural resources'.[297] Another provision that indicates the orientation of Swiss foreign relations is the Confederation's commitment 'to a just and peaceful international order'.[298] While case law on these constitutional goals and principles is non-existent, concretizations can be found in legislation,[299] as well as in a number of governmental documents.[300] The Foreign Policy Strategy Report for 2016–19, for instance, enumerates the foundational principles of Swiss foreign relations: the rule of law, neutrality, universality, dialogue, solidarity, responsibility, efficiency, and coherence.[301]

The commitment of the Swiss State to the rule of law in both interstate and intrastate matters figures among the basic principles of Swiss foreign relations,[302] and it is included (either explicitly or through related terms, such as 'legal certainty') under three of the four strategic priorities mentioned in the Swiss Foreign Policy Strategy Report.[303] The rule of law also appears in numerous passages of the Federal Council's Foreign Policy Report.[304] The federal government has linked Switzerland's attachment to the rule of law to its acceptance of the ICJ's compulsory jurisdiction under art. 36(2) ICJ Statute,[305]

297 Art. 54(2) Cst.

298 Art. 2(4) Cst.

299 See especially the FA-CPP.

300 Such documents include the Foreign Strategy Report, which the FDFA submits to the Federal Council at the beginning of a legislative term (FDFA, *Swiss Foreign Policy Strategy 2016–19: Federal Council Report on the Priorities for the 2016–19 Legislative Period*,<www.dfae.admin.ch/content/dam/eda/en/documents/publications/Schweizerische Aussenpolitik/Aussenpolitische-Strategie-160301_EN.pdf>), and the annual Federal Council's Foreign Policy Report (Federal Council, *Foreign Policy Report 2018*, FG 2019 1505, <www.admin.ch/opc/de/federal-gazette/2019/1505.pdf>). The FDFA intermittently publishes reports on specific foreign policy issues, such as neutrality, international cooperation, and counter-terrorism, and several periodicals.

301 FDFA, *Swiss Foreign Policy Strategy 2016–19* (n 300) 11 ff.

302 Ibid 5.

303 Ie, 'relations with the European Union and the EU and EFTA member states', 'relations with global partners', 'peace and security', and 'sustainable development and prosperity', ibid 14 ff.

304 Federal Council, *Foreign Policy Report 2018* (n 300); for an earlier example, see Federal Council, *Foreign Policy Report 2015*, FG 2016 503, <www.admin.ch/opc/fr/federal-gazette/2016/503.pdf>, 537 f; 549 ff; 610 ff.

305 FDFA, *Handbook on Accepting the Jurisdiction of the International Court of Justice: Model Clauses and Templates*, 2014, <www.eda.admin.ch/content/dam/eda/en/documents/publications/Voelkerrecht/handbook-jurisdiction-international-court_en>. See also <www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=CH>.

to its cooperation with the *ad hoc* international criminal tribunals,[306] and to its ratification of the ICC Statute.[307] It has also mentioned it in connection with the ECHR, ratified by Switzerland in 1974,[308] and with the ICCPR and ICESCR, which Switzerland ratified in 1992.[309] This commitment to the rule of law also manifests itself via the Swiss government's efforts to push reforms of the UN Security Council[310] and the UN treaty bodies.[311]

Another salient feature of Swiss foreign affairs is Switzerland's neutrality.[312] It explains why Switzerland has been reluctant (or has refused) to join IOs such as the UN (Switzerland became a member in 2002),[313] NATO (Switzerland is not a party to the 1949 North Atlantic Treaty), the EU (Switzerland is not an EU member State), and the EEA (Swiss voters rejected a proposed adhesion in 1992). The law of neutrality being relevant for the Swiss legal order, Switzerland is a 'specially affected State' in this regard.

306 Federal Council, *Botschaft betreffend den Bundesbeschluss über die Zusammenarbeit mit den Internationalen Gerichten zur Verfolgung von schwerwiegenden Verletzungen des humanitären Völkerrechts*, 18 October 1995, FG 1995 IV 1101, for instance at 1105.

307 Federal Council, *Botschaft über das Römer Statut des Internationalen Strafgerichtshofs, das Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof und eine Revision des Strafrechts*, 15 November 2000, FG 2001 391, for instance at 406, 431, and 483.

308 Federal Council, *40 Jahre EMRK-Beitritt der Schweiz: Erfahrungen und Perspektiven, Bericht des Bundesrates in Erfüllung des Postulats Stöckli 13.4187 vom 12. Dezember 2013*, 14 November 2014, FG 2015 357, at 359, 407 f, 410. The ECHR was ratified after the removal of two constitutional obstacles. First, women's suffrage was introduced in 1971. Then, in 1973, the so-called 'confessional articles' of the Swiss Constitution (which discriminated against the Jesuits, and prohibited both the creation of new monasteries or religious orders and the restoration of abolished ones) were abrogated.

309 Federal Council, *Botschaft betreffend den Beitritt der Schweiz zu den beiden internationalen Menschenrechtspakten von 1966 und zu einer Änderung des Bundesrechtspflegegesetzes vom 30. Januar 1991*, 2 April 1991, FG 1991 I 1189, at 1196.

310 <www.eda.admin.ch/missions/mission-new-york/en/home/working-methods-of-the-security-council.html>.

311 <www.un.org/ruleoflaw/blog/portfolio-items/switzerland-strengthening-and-enhancing-the-effective-functioning-of-the-human-rights-treaty-body-system>.

312 For an analysis of Switzerland's history of neutrality from the perspective of international law, see Detlev F Vagts, 'Editorial Comment: Switzerland, International Law and World War II' (1997) 91 American Journal of Jurisprudence 466.

313 In 1947, Manley O Hudson wrote: 'As [Switzerland] had stayed out of all but humanitarian action through two World Wars, she was not to be regarded in 1945 as a "peace-loving" state. Of course the scenes on the stage of 1945 have now shifted to some extent, and possibly Switzerland could today qualify for United Nations membership. She has made no application for such membership, however, and her centuries-old tradition of neutrality may keep her from shouldering the obligations of the Charter for many years to come'. See Hudson (n 1) 867.

Its neutrality notwithstanding, and in line with its commitment to the rule of law in international relations, Switzerland has entered into a number of international legal relationships with States and other subjects of international law. It has concluded two sets of bilateral agreements with the EU, and it has ratified a wide range of other bilateral and multilateral treaties.[314] Switzerland is a member of an array of international and regional organizations, including the UN, the WTO, the Council of Europe, the EFTA, the OSCE, and the OECD, and it cooperates with NATO through the 'Partnership for Peace' program.

Partly owing to its neutrality, Switzerland is the host State of an important number of IOs and UN agencies. The headquarters of these organizations are mostly in Geneva. The city harbors one of the four main offices of the UN, the ICRC, the ILO, the WHO, the WIPO, the ISO, and many other organizations.[315] Other IOs are based in Basel (where the BIS has its seat) or Bern (where the Universal Postal Union and the Intergovernmental Organization for International Carriage by Rail are located). The presence of these organizations on Swiss territory is governed by domestic legal provisions[316] and international treaties[317] which clarify these organizations' rights and duties, including the privileges and immunities granted by the host State. The international law on privileges and immunities of States, IOs, and their agents is hence relevant to the Swiss judicial practice of international law and makes Switzerland a 'specially affected State' in this respect.[318] It is worth noting that due to the presence of these organizations, Switzerland is the depositary of many treaties (eg the Geneva Conventions).[319]

314 For an overview: <www.admin.ch/opc/de/classified-compilation/international.html>.

315 <www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-organizations/international-organizations-switzerland.html>.

316 See especially the Federal Act on the Privileges, Immunities and Facilities, and the Financial Subsidies Granted by Switzerland as a Host State of 22 June 2007 (SR 192.12).

317 As of June 2019, Switzerland had entered into headquarters agreements with 27 IOs: see <www.eda.admin.ch/eda/en/home/foreign-policy/international-organizations/international-organizations-switzerland.html>.

318 On the Swiss practice in this area, see Neumann and Peters (n 12).

319 As of June 2019, Switzerland was the depositary of 79 treaties. See <www.dfae.admin.ch/eda/en/home/aussenpolitik/voelkerrecht/internationale_vertraege/depositar.html>. On the functions of depositaries, see Claude Schenker, 'Dépositaire : une impartialité sous surveillance. L'exemple de la Suisse' (2018) 28 Swiss Review of International and European Law 25.

2.1.2 Domestic Separation of Powers in Foreign Relations

The domestic separation of powers defines the respective competences of the three branches of government in foreign relations.[320] It constrains domestic courts' interpretation of international law by specifying the instances in which courts are legally required to defer to the other branches.

Regarding the horizontal (inter-branch) separation of powers, the Swiss Constitution provides that foreign relations are the primary responsibility of the federal government (the Federal Council).[321] The government has the power to sign and ratify treaties,[322] which in principle require the subsequent approval of the federal parliament (the Federal Assembly).[323] In practice, and like in many States,[324] the Federal Council often ratifies treaties based on its independent powers to do so.[325] As far as the judiciary is concerned, the Swiss Federal Tribunal has the duty to apply international law,[326] although some foreign relations issues fall outside of its jurisdiction (*infra*, 4.2.1). The Federal Assembly 'participate[s] in shaping foreign policy and supervise[s] the maintenance of foreign relations'.[327] The parliamentary powers in foreign relations should not be underestimated. The Federal Assembly comprises two Foreign Policy Committees (one for each house). The Committees examine specific issues referred to them, and they formulate proposals in their area of responsibility.[328] The Federal Council regularly informs and consults them.[329] By launching initiatives and parliamentary interventions, the Committees can raise issues related to foreign relations.[330]

It is worth mentioning that in the past, the Swiss constitutional order provided for a 'co-mingling of the powers of government',[331] as the federal

320 For an analysis of international law in domestic courts from the perspective of the constitutional separation of powers: David Haljan, *Separating Powers: International Law Before National Courts* (TMC Asser Press 2013).

321 Art. 184(1) Cst.

322 Art. 184(2) Cst.

323 Art. 166(2) Cst.

324 One example is the high practical relevance of sole executive agreements in US foreign relations.

325 Art. 7a of the Federal Government and Administration Organization Act of 21 March 1997 (SR 172.010).

326 Art. 190 Cst.

327 Art. 166(1) Cst.

328 Art. 44 FA-FA.

329 Art. 152 FA-FA.

330 Art. 45(1)(a) FA-FA.

331 Ruth D Masters, *International Law in National Courts: A Study of the Enforcement of International Law in German, Swiss, French and Belgian Courts* (Columbia University Press 1932) 90.

parliament and the federal executive both exercised 'executive, legislative, and judicial functions'.[332] This 'co-mingling' was starkly attenuated by subsequent constitutional amendments.

The Constitution further clarifies the vertical separation of powers between the Confederation and the cantons in international relations (see also *infra*, 3.1). While foreign affairs are a federal matter,[333] the cantons must be consulted by the federal government whenever their interests are affected by a decision,[334] and these interests must be respected by foreign policy.[335] The cantons also have limited treaty-making powers.[336]

2.2 *International Law in the Swiss Legal Order*

Another feature that constrains Swiss courts' interpretative activity concerns the way the Swiss legal order regulates its relationship to international law, ie, the status (2.2.1), rank (2.2.2), and direct effect (2.2.3) of international law.[337] Given the scarce guidance provided by the Swiss Constitution on these issues, emphasis is placed on the practice of the Swiss authorities. The Swiss Federal Tribunal in particular has clarified several aspects of this relationship.

2.2.1 Status

The domesic status of international law pertains to the conditions under which international law becomes an integral part of domestic law. In this regard, States oscillate between two poles: monism and dualism. Monism does not require that international law be transposed into domestic law to be valid in the domestic legal order. By contrast, dualism demands such a transposition. It is based on a conception of domestic and international law as two separate, 'self-contained'[338] sets of norms that 'never overlap'.[339]

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332 See ibid 91.

333 Art. 54(1) Cst.

334 Art. 55(1) Cst; Federal Act on the Participation of the Cantons in the Foreign Policy of the Confederation of 22 December 1999 (SR 138.1).

335 Art. 54(3) Cst.

336 Art. 56(1) Cst.

337 See already Besson and Ammann (n 60). See also (with references): Besson, *Droit international public : Abrégé de cours et résumés de jurisprudence* (n 89) 303 ff.

338 Giorgio Gaja, 'Dualism: A Review' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007) 52.

339 In the original: 'deux cercles qui sont en contact intime, mais qui ne se superposent jamais'; Heinrich Triepel, 'Les rapports entre le droit interne et le droit international' (1923) 1 Recueil des cours de l'Académie de droit international 83.

Overall, Swiss law and practice endorse monism: the Constitution does not require that treaties be transposed to be part of the domestic legal order,[340] all levels of government must respect international law,[341] courts must apply international law,[342] and constitutional amendments cannot disregard so-called mandatory provisions of international law.[343] The Swiss Federal Tribunal has mentioned the monism of the Swiss legal order early on,[344] and it endorses it with regard to all sources of international law.[345] On the other hand, some of the Court's early rulings were clearly dualist,[346] and past scholarly writings have stated that 'Swiss jurists adhere to the dualistic theory'.[347] While several proposals to switch to dualism have been made at the federal legislative level,[348] they have never garnered enough parliamentary support. They have also been consistently rejected by the Federal Council.[349]

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340 BGE 127 II 177, at 2 c).

341 Art. 5(4) Cst.

342 Art. 190 Cst.

343 Art. 139(3), art. 193(4), art. 194(2) Cst.

344 See the decision cited in Federal Council, *Botschaft an die Bundesversammlung betreffend die Mitwirkung der Schweiz bei Ausführung der Generalakte der Konferenz von Algesiras vom 7. April 1906*, FG 1907 II 112, 15 March 1907, at 119; the case is mentioned by Masters (n 331) 96. See also ibid 98. For later decisions, see eg BGE 132 III 122, at 3.1.1 (explicit reference to monism with primacy of international law); BGer, judgment 9C_873/2012 of 25 February 2013, at 4.2 (explicit reference to monism); BGE 130 I 312, at 4.1 (explicit reference to monism with primacy of international law); BGE 122 II 234, at 4 a), and BGE 94 I 669, at 2 (implicit references to monism).

345 BGer, judgments 2A.783/2006, 2A.784/2006, and 2A.785/2006 of 23 January 2008, at 7.1; BGE 133 II 450, at 6.1; BGE 44 I 49, at 4. See further: BGer, judgment 2C_950/2012 of 8 August 2013, at 2.2 (treaties); BGE 115 Ib 496, at 5 b) (CIL); BGer, judgment 1A.63/2002 of 9 April 2002, at 2.1 (general principles of international law). See for instance Astrid Epiney, 'Das Verhältnis von Völkerrecht und Landesrecht aus der Sicht des Bundesgerichts: Anmerkung zum BGE 2C_828/2011 vom 12. Oktober 2012' Jusletter of 18 March 2013.

346 BGE 49 I 188, at 3, cited in Masters (n 331) 97.

347 See ibid 98.

348 Lukas Reimann, Motion 14.3221 and Motion 16.3239, Dualismus statt Monismus, 27 May 2014 and 3 May 2016; Swiss People's Party, Postulat 09.3676, Völkerrecht und Landesrecht: Systemwechsel vom Monismus zum Dualismus, 11 June 2009; Christoph Mörgeli, Interpellation 04.3802, Europäische Menschenrechtskonvention und schweizerische Souveränität, 16 December 2004; Samuel Schmid, Interpellation 96.3479, Völkerrecht: Wechsel zum Dualismus, 2 October 1996; Alexander J. Baumann, Motion 96.3482, Systemwechsel für die Einführung von Völkerrecht, 2 October 1996.

349 Federal Council, *2010 Report on International and Domestic Law* (n 143), at 2320.

The *irritante alternative*[350] between monism and dualism is often criticized for being simplistic, at odds with reality, and of limited practical significance.[351] Still, it remains the most accurate and useful way of capturing the range of positions States adopt with regard to the status of international law in their legal order. However, it is important to note that this status hinges on the practice of a given State[352] rather than on its commitments on paper. It could even be argued that States are initially dualist, before positioning themselves on the monist/dualist spectrum via their organs. Another important point is that the distinction between monism and dualism is a spectrum rather than a dichotomy.[353] Status is multifaceted: a State may be monist (or dualist) with regard to some sources,[354] norms, or substantive areas of international law, but not with regard to others.[355] Its practice may change over time, and the practice of different State organs may be inconsistent. In monist States like Switzerland, courts still have to decide whether or not international law is applicable to a given case.[356] In this context, they may (consciously or unconsciously) adopt 'blunting rules', as the ILA Study Group on the Principles on

350 Denis Alland, 'Les destins internes du droit international public', *Anzilotti et le droit international public : un essai* (2nd edn, Pedone 2013) 91.

351 Pierre-Hugues Verdier and Mila Versteeg, 'International Law in National Legal Systems: An Empirical Investigation' (2015) 109 American Journal of International Law 514, 516; ILA, 'Preliminary Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61) 6; Charlesworth and others (n 65) 2; Besson, 'Theorizing the Sources of International Law' (n 151) 184. See also Federal Council, *2010 Report on International and Domestic Law* (n 143), at 2286.

352 For such a diagnosis: Nijman and Nollkaemper (n 144) 2 f; Mattias Kumm, 'Democratic Constitutionalism Encounters International Law: Terms of Engagement' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 257.

353 Jean Dhommeaux, 'Monismes et dualismes en droit international des droits de l'homme' (1995) 41 Annuaire français de droit international 447, 448; Andreas L Paulus, 'The Emergence of the International Community and the Divide Between International and Domestic Law' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007) 229; Charlesworth and others (n 65) 2. See also Federal Council, *2010 Report on International and Domestic Law* (n 143), at 2291.

354 Bugalo Maripe, 'Giving Effect to International Human Rights Law in the Domestic Context of Botswana: Dissonance and Incongruity in Judicial Interpretation' (2014) 14 Oxford University Commonwealth Law Journal 251, 258.

355 See the examples in ILA, '(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15) 8 f.

356 This preliminary question is reminiscent of what, in US law, has been called *Chevron* step zero, see Cass R Sunstein, 'Chevron Step Zero' (2006) 92 Virginia Law Review 187. I am indebted to David Scott Louk for drawing my attention to this point.

the Engagement of Domestic Courts With International Law (hereinafter: 'ILA Study Group on Domestic Courts') calls them, ie, approaches that mitigate the monism of their legal order.[357]

Courts are constrained by the monism of the Swiss State, but they also contribute to shaping it. Monism is often associated with a favorable, 'open' attitude towards international law,[358] and *vice versa*. Granted, dualist States, which apply international law in its domesticated form, are more likely to reason as if they were applying domestic law.[359] On the other hand, their organs might be more willing to apply international law than those of monist jurisdictions.[360] Much depends, as previously stated, on the practice of the State authorities.[361] Swiss courts for instance sometimes mention international law even when it has not been invoked by the parties.[362] They also tend to apply domestic and international law in parallel when their subject matters overlap,[363] as opposed to courts in other States.[364] This matches the observation made by Rosalyn Higgins that in monist jurisdictions, international law is more likely to be 'treated as a familiar topic' by the courts.[365] On the other hand, Swiss courts

357 See *infra* (n 641). The CEDAW Committee for instance, in its Concluding Observations of 2016 pertaining to Switzerland's 4th and 5th periodic reports, criticizes 'the limited awareness of the [CEDAW] Convention and the general recommendations of the Committee as important tools of interpretation within the judiciary', among other actors. See Concluding Observations of the CEDAW Committee, UN Doc CEDAW/C/CHE/CO/4-5, 18 November 2016, para 10 f.

358 Gaja (n 338) 61. See also Federal Council, *2010 Report on International and Domestic Law* (n 143), 2285.

359 Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2016) 143.

360 Federal Council, *2010 Report on International and Domestic Law* (n 143), 2286. See also (on dualist South Africa): John Dugard, 'South Africa' in David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009) 475.

361 Federal Council, *2010 Report on International and Domestic Law* (n 143), at 2300. For an example, see Melissa A Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 Columbia Law Review 628.

362 BGE 139 I 129, at 3.3 (art. 6(1) ECHR and art. 14 ICESCR). See also BGE 141 I 211 (regarding the ECHR and the ICCPR). See, by contrast, BGE 141 I 97, where the appellant was explicitly relying on art. 6(1) ECHR (at 5) and art. 14 ICCPR (at 6).

363 BGE 140 IV 108, at 6.8 (art. 17(3) Cst. and art. 10 ECHR); BGE 141 II 182, at 6.3.6, 6.4.1 (art. 16(3) Cst. and art. 10 ECHR).

364 Eg Veronika Fikfak, 'English Courts and the "Internalisation" of the European Convention of Human Rights? Between Theory and Practice' (2015) 5 UK Supreme Court Annual Review 118, 24 ss.

365 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 206.

also refrain from referring to relevant international law in some cases.[366] In a judgment issued in 2018, for instance, the Swiss Federal Tribunal held that whenever national law did not conflict with international law (*in casu* with the Swiss–EU Agreement on the Free Movement of Persons), the lower court 'must first apply the national law, with which it is familiar'.[367] Such statements illustrate the ambivalent role domestic courts often adopt with regard to the interpretation of international law.

2.2.2 Rank

The domestic rank of international law pertains to how conflicts between domestic and international law are resolved under domestic law. Although 'one of the great principles of international law, informing the whole system and applying to every branch of it'[368] is that international law, *qua* law, claims supremacy over domestic law,[369] including constitutional law,[370] the rank of international law in the domestic legal order is governed by domestic law.

In Switzerland, the rank of international law is controversial given the constitutional silence on the matter, and due to the high stakes involved for the Swiss State. The issue regularly surfaces in Swiss politics.[371]

366 One example is BGE 136 III 168, at 3.3.4, where the Court applied the Schubert Praxis but did not mention contradictory international law, especially not the principle *pacta sunt servanda* (art. 26 VCLT). See, by contrast, BGE 139 I 16, at 5.1, where the Court mentioned art. 27 VCLT.

367 BGE 145 V 55, at 4.1.

368 Gerald Fitzmaurice, 'The General Principles of International Law Considered From the Standpoint of the Rule of Law' (1957) 92 Recueil des cours de l'Académie de droit international 85.

369 ICJ, case concerning the *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, advisory opinion, ICJ Reports 1988, 26 April 1988, 12, 34 f, para 57.

370 PCIJ, case concerning the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, advisory opinion, PCIJ Series A/B No 44, 4 February 1932, 3, at 24; ICJ, case concerning *Avena and Other Mexican Nationals* (*Mexico v. United States*), judgment, ICJ Reports 2004, 31 March 2004, 12, at 65, para 139; Anne Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law' (2009) 3 Vienna Online Journal on International Constitutional Law 170, 183 f.

371 To mention two recent examples: first, a popular initiative launched by the Swiss People's Party and rejected by Swiss voters in 2018 aimed, *inter alia*, at establishing the supremacy of the Swiss Constitution over international law, except for mandatory provisions of international law (see <www.admin.ch/ch/d/pore/vi/vis460t.html>). Second, in June 2015, the Federal Council examined the proposal of the parliamentary group 'FDP. The Liberals' to arbitrate conflicts between Swiss law and international law through a democratic tiebreaker. The group suggested determining the rank of international law in the Swiss legal order based on the respective degrees of democratic legitimacy of

States often acknowledge the supremacy of international law in principle,[372] but they seldom accept that international law is supreme over all of domestic law.[373] As a matter of fact, the Swiss Federal Tribunal has made clear that the Constitution does not endorse an 'unconditional supremacy of international law over domestic law'.[374] Indeed, the Constitution does not settle the issue of rank, except for 'mandatory provisions of international law'[375] which constitutional amendments must respect (on this autonomous notion of Swiss law, see *infra*).

Regardless of how they address the issue of rank, States typically try to avoid conflicts between domestic law and international law in the first place. They do so chiefly through the principle of consistent interpretation,[376] which expresses a State's adherence to the supremacy of international law.[377] This principle establishes the presumption that legislatures intend to comply with the State's international obligations.[378] The Swiss Federal Tribunal first articulated the principle of consistent interpretation in 1968, holding that the federal legislature was to be presumed not to have intended to violate international law.[379] 'In case of doubt,' the Court added, 'domestic law is to be interpreted consistently with international law', a principle reflecting 'new trends in France, in the Federal Republic of Germany and in the Netherlands'.[380]

Despite consistent interpretation, conflicts between international law and Swiss law do arise. To analyze how clashes are handled by the Swiss authorities,

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the domestic and international legal norm at stake (FDP.The Liberals Group, Postulat 13.3805, Klares Verhältnis zwischen Völkerrecht und Landesrecht, 24 September 2013). The Federal Council recommended the rejection of the proposal, stating that it was difficult to implement and that conflicts would increasingly be resolved in favor of Swiss law (Federal Council, *Klares Verhältnis zwischen Völkerrecht und Landesrecht, Bericht des Bundesrates in Erfüllung des Postulates 13.3805*, 12 June 2015, <www.ejpd.admin.ch/dam/data/bj/staat/gesetzgebung/voelkerrecht/ber-br-d.pdf>, at 2). The parliament followed the Federal Council's recommendation and rejected the proposal.

372 BGer, judgment 1A.161/2000 of 15 June 2000, at 4 f).

373 André Nollkaemper, 'Rethinking the Supremacy of International Law' (2010) 65 Zeitschrift für öffentliches Recht 65.

374 BGE 133 V 367, at 11.1.2.

375 Art. 139(3), 193(4), and 194(2) Cst.

376 For an articulation of this principle in the United States, see *Murray v. the Charming Betsey*, 6 U.S. 64 (1804).

377 BGE 122 II 234, at 4 e). On States' duty of consistent interpretation, see PCIJ, case concerning the *Exchange of Greek and Turkish Populations*, advisory opinion, PCIJ Series B No 10, 21 Feburary 1925, 6, at 20.

378 On this point, see *The Interpretation of Statutes* (n 54) 8 f.

379 BGE 94 I 669, at 6 a).

380 Ibid.

one must distinguish between cantonal law, federal law to the exclusion of so-called 'federal acts' (art. 164 Cst.), federal acts, and constitutional law.

The supremacy of international law is uncontroversial with regard to cantonal law,[381] since federal law (which includes international law)[382] trumps cantonal law.[383] An equally straightforward case is the relationship between international law and federal law, excluding federal acts pursuant to art. 164 Cst. The Constitution states that the courts 'apply the federal acts'.[384] Apart from federal acts, however, federal law (eg federal ordinances and decrees) gives way to international law.

The relationship between international law and federal acts (as defined by art. 164 Cst.) is without doubt the aspect of the interface between Swiss law and international law that has spilt the most ink.[385] To handle conflicts between international law and federal acts, the starting point is art. 190 Cst. This provision states that Swiss courts 'apply the federal acts and international law'. Art. 190 entails that courts cannot refrain from applying federal acts and international law (*infra*, 3.5), but it does not clarify their relationship. Hence, whenever federal acts and international law conflict, Swiss courts are in a typical case of 'double bind':[386] they are bound by two incompatible legal duties.

The Swiss Federal Tribunal's interpretation of art. 190 Cst. has fluctuated over time. In its early case law, the Court often denied the existence of a conflict by presuming that the legislature had not intended to derogate from international law.[387] Yet in 1933, it held that treaties had 'no other value than any other law regularly voted in and promulgated', and that conflicts were to be resolved by giving preference to the *lex posterior*.[388] Later

381 BGE 135 II 243, at 3.1.

382 Bernhard Ehrenzeller, Benjamin Schindler, and Rainer J Schweizer (eds), *Die schweizerische Bundesverfassung: St. Galler Kommentar* (3rd edn, Dike 2014) 1044.

383 Art. 49(1) Cst.

384 Art. 190 Cst.

385 Eg Stefan Schürer, 'Hat die PKK-Rechtsprechung die Schubert-Praxis relativiert? Eine Analyse der PKK-Rechtsprechung und ihrer Auswirkungen auf die Schubert-Praxis' (2015) 116 Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 115; Marco Sassòli, 'Völkerrecht und Landesrecht: Plädoyer eines Völkerrechtlers für Schubert' in François Bellanger and Jacques de Werra (eds), *Genève au confluent du droit interne et du droit international : Mélanges offerts par la Faculté de droit de l'Université de Genève à la Société suisse des juristes à l'occasion du Congrès 2012* (Schulthess 2012).

386 Nollkaemper, *National Courts and the International Rule of Law* (n 47) 14.

387 Masters (n 331) 100 ff. As early as 1884, in BGE 10 I 583, at 1, the Court applied a treaty contradicting a prior federal act. For early rulings in which the Court endorses the supremacy of international law, see BGE 42 I 102, at 1; BGE 27 I 52, at 1; BGE 7 I 774, at 4.

388 BGE 59 II 331, at 4.

rulings[389] reflect an endorsement of the supremacy of international law and of the idea that whenever a treaty settles an issue, federal acts are not applicable, or only on a subsidiary basis.[390] Since the early 1990s, the Court has deemed the principle of supremacy 'largely undisputed'.[391] It has emphasized the supremacy of human rights treaties,[392] but also of treaties in general,[393] and it considers that supremacy 'follows from the very nature of the international legal norm, which is hierarchically superior to any domestic legal norm'.[394] It has thereby abandoned its practice of prioritizing the *lex posterior*,[395] at least in principle (on the Schubert Praxis, see *infra*).

The recent practice confirms the Court's ambivalent attitude towards international law. On the one hand, the Court considers that the duty to apply federal acts pursuant to art. 190 Cst. does not prohibit[396] examining their conformity with constitutional law and with international law,[397] especially with the ECHR[398] (*Anwendungsgebot, kein Prüfungsverbot*). Hence, the Swiss Federal Tribunal can point to inconsistencies between domestic law and international law, and it can recommend that the legislature amend problematic provisions.[399] The Court has gone further. It has refrained from applying federal acts conflicting with the ECHR[400] and with the Swiss–EU Agreement on the Free Movement of Persons,[401] and it has even hinted that based on the supremacy of international law, it might interpret federal acts *contra legem* and consistently with international law.[402] On the other hand, the Court has

389 BGE 123 II 279, at 2 d); BGE 119 V 171, at 4 a); BGE 116 Ib 106, at 1 a); BGE 111 V 201, at 2 b); BGE 110 V 72, at 2 b); BGE 109 Ib 165 at 7 b); BGE 106 Ib 400, at 5 a); BGE 100 Ia 407, at 1 b); BGE 97 I 372, at 1; BGE 91 I 127, at 2; BGE 87 I 134, at 2.

390 BGE 123 II 134, at 1 a); BGE 122 II 485, at 1; BGE 122 II 140, at 2 (on the so-called 'principle of favor', pursuant to which the Court applies domestic laws if they are more generous regarding mutual legal assistance in criminal matters).

391 BGE 119 V 171, at 4 a).

392 BGE 125 II 417, at 4 d).

393 BGE 141 II 436, at 4.1; BGE 139 I 16, at 5.1; BGE 138 II 524, at 5.1. See also (implicitly) BGE 123 II 279, at 2 d).

394 BGE 131 V 66, at 3.2.

395 BGE 122 II 485, at 3 a).

396 Some scholars even argue that the Court should be required to bring such inconsistencies to the legislature's attention, see Ehrenzeller, Schindler, and Schweizer (n 382) 3053.

397 BGE 136 I 49, at 3.1.

398 BGE 117 Ib 367, at 2 e) and f).

399 BGE 136 I 49, at 3.1 (regarding constitutional law); BGE 117 Ib 367, at 2 e) and f) (regarding international law).

400 BGE 125 II 417, at 4 d); BGE 130 I 312, at 1.1 and 4.3.1.

401 See especially BGE 133 V 367, at 11. See also BGE 131 II 352, at 1.3.2.

402 BGE 136 II 120, at 3.5.3. The case pertained to the Federal Act on Foreign Nationals (SR 142.20) and art. 14 ECHR.

adopted a hands-off approach when reviewing the conformity of federal acts with the ECHR.[403] Moreover, the Court maintains a significant exception to the principle of supremacy, namely the so-called Schubert Praxis.[404]

The Schubert Praxis owes its name to the Swiss Federal Tribunal's ruling of 1973 in *Schubert contro Commissione cantonale ticinese di ricorso.* In this case, the Court held that whenever the legislature willingly derogates from the State's existing international legal obligations, the more recent federal act will trump international law.[405] The Court allows counter-exceptions to this exception, namely when federal acts are intended to derogate from the ECHR[406] or from the non-discrimination principle enshrined in the Swiss–EU Agreement on the Free Movement of Persons.[407] Another exception mentioned by judges and scholars is *jus cogens*.[408] In other cases, however, *Schubert* applies. A flexible, *ad hoc* approach to the issue of rank enables judges to take the content of international and domestic legal acts into account when settling conflicts between domestic and international law.[409] It remains that when Swiss courts apply *Schubert*, they trigger a violation of international law and, therefore, Switzerland's international responsibility. It is worth noting that the Schubert Praxis has been addressed inconsistently by different chambers of the Swiss Federal Tribunal,[410] and that some rulings reflect the Court's internal divisions in a way that is unusually candid by Swiss standards.[411]

Another contentious issue relates to conflicts between international law and Swiss constitutional law. Indeed, the Swiss Constitution states that constitutional amendments must respect 'mandatory provisions of international

403 Stefan Schürer, 'Die punktuelle Neutralisierung der EMRK in der Praxis des Bundesgerichts. Zur verkürzten Grundrechtsprüfung bei der Anwendung von Bundesgesetzen' (2016) 117 Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 171.

404 BGE 136 III 168.

405 BGE 99 Ib 39, at 3, 4.

406 See the references in BGE 139 I 16, at 5.1.

407 BGE 133 V 367, at 11 and especially 11.6; BGE 142 II 35, at 3.

408 Gilbert Kolly, 'Le Tribunal fédéral suisse' (2016) 3 Les Nouveaux Cahiers du Conseil constitutionnel 47, 52; Sassòli (n 385) 198 f.

409 Federal Council, *Klares Verhältnis zwischen Völkerrecht und Landesrecht, Bericht des Bundesrates in Erfüllung des Postulates 13.3805*, 12 June 2015, <www.ejpd.admin.ch/dam/data/bj/staat/gesetzgebung/voelkerrecht/ber-br-d.pdf>.

410 Compare for instance BGE 139 I 16 and BGE 136 III 168.

411 In a decision of 1993, the Court noted that the principle of the supremacy of international law was 'largely undisputed'; the only contrary opinion it mentioned was a law review article by federal judge Hansjörg Seiler, who was not involved in deciding the case and whose opinion the Court deemed 'very much in the minority' (BGE 119 V 171, at 4 a)).

law',[412] but it does not prohibit constitutional enactments from violating non-mandatory international law.

The concept of 'mandatory provisions of international law' is an autonomous concept of Swiss law. Its scope is broader than the (in any case contested and unsharp) international concept of *jus cogens* pursuant to art. 53 VCLT, as 'Swiss' *jus cogens* includes non-derogable ECHR and ICCPR rights.[413] However, the Swiss Constitution does not exclude the possibility that its provisions might violate derogable international human rights.[414] Although the Federal Council has stated that constitutional law must be interpreted in light of the supremacy of international law, except when 'fundamental principles or the core content of fundamental rights' are at stake,[415] this one-time statement has not been taken up by Swiss courts. Yet the Swiss Federal Tribunal has sought to mitigate the risk that Switzerland's international responsibility be triggered by constitutional provisions violating non-mandatory international law, especially ECHR guarantees. It has held that constitutional law lacking direct effect must be further specified by the federal legislature, especially regarding its relationship with international law.[416] In this landmark case pertaining to the popular initiative on the expulsion of foreign criminals, the Court considered that even if a constitutional provision conflicting with the ECHR has direct effect, judges must respect the European Convention when applying the Constitution.[417] Another sign that the Court seeks to avert international responsibility is that it has preventively given preference to the ECHR by pointing

412 Art. 139(3), 193(4), and 194(2) Cst.

413 Federal Council, *2010 Report on International and Domestic Law* (n 143), at 2314. See also BGE 133 II 450, at 7.1, where the Swiss Federal Tribunal considers that non-derogability indicates that a norm has the character of *jus cogens*. See also Federal Council, *Botschaft zur Volksinitative 'Schweizer Recht statt fremde Richter* (*Selbstbestimmungsinitiative*)', FG 2017 5355, at 5365.

414 BGE 139 I 16, at 5.2.1.

415 Federal Council, *Botschaft zur Genehmigung des Abkommens über den Europäischen Wirtschaftsraum vom 18. Mai 1992*, 21 August 1992, FG 1992 IV 1, at 92 ('Grundprinzipien und Kerngehalte der Grundrechte'). The French translation speaks of 'principes fondamentaux ou l'essence même des droits fondamentaux', see the French version of FG 1992 IV 1, at 87.

416 BGE 139 I 16, at 4.3.4.

417 Ibid, at 5.3. The case has been widely discussed in Swiss scholarship and politics. See for instance Giovanni Biaggini, 'Über die Auslegung der Bundesverfassung und ihr Verhältnis zur EMRK' (2013) 114 Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 316; Astrid Epiney, 'Zur Rolle des Bundesgerichts bei der Verfassungsauslegung: Gedanken zu BGE 139 I 16' Jusletter of 6 October 2014; Yvo Hangartner, 'Bundesgerichtlicher Positionsbezug zum Verhältnis von Bundesverfassung und Völkerrecht' (2013) Aktuelle juristische Praxis / Pratique juridique actuelle 698.

out that under Swiss law, its own decisions may be revised if the ECtHR subsequently rules that they have triggered an ECHR violation.[418]

The question of rank is often contentious, and even more so considering the ambiguity of the Swiss Constitution regarding this subject. Given that the determination of this sensitive issue is conferred to the courts, it is essential that Swiss judges settle it based on the law's interpretative methods, in a predictable, clear, and consistent way.

2.2.3 Direct Effect

An international legal act has direct effect (ie, it is 'directly enforceable' or 'self-executing') if it can be relied upon by individuals in court. If it lacks direct effect, the act cannot be invoked until the legislature has concretized it.[419] Direct effect raises the question of which State organ has the legal power to reduce the law's vagueness.[420] The modalities of direct effect are usually defined by domestic law.[421] In rare cases, however, direct effect is mandated by international law.[422]

The direct effect of international law is a complex issue that cannot be fully addressed here.[423] In the following subsections, I set out and evaluate the practice of the Swiss Federal Tribunal regarding the direct effect of written (2.2.3.1) and unwritten (2.2.3.2) international law, before providing some concluding remarks (2.2.3.3). I focus on the case law of the Swiss Federal Tribunal because it is particularly rich and detailed compared to that of other Swiss courts.

2.2.3.1 *Written International Law*

The Swiss Federal Tribunal has mainly addressed the criteria of direct effect in connection with treaty law. The Court, which deems direct effect 'a question of interpretation',[424] considers that an international legal act has direct effect

418 Ehrenzeller, Schindler, and Schweizer (n 382) 3051. See art. 122 FA-SFT.

419 Federal Council, *2010 Report on International and Domestic Law* (n 143), at 2286.

420 Wüger (n 104) 205.

421 Thomas Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law' (1992) 235 Recueil des cours de l'Académie de droit international 303, 396; Forteau (n 108) 99 f. See also BGE 126 I 240, at 2 g).

422 ICJ, *LaGrand* (*Germany v. United States*), judgment, ICJ Reports 2001, 27 June 2001, 466, at 494, para 77, regarding art. 36(1) VCCR; PCIJ, case on the *Jurisdiction of the Courts of Danzig* (*Pecuniary Claims of Danzig Railway Officials Who Have Passed Into the Polish Service, Against the Polish Railways Administration*), advisory opinion, PCIJ Series B No 15, 3 March 1928, 4, at 17 f (on the Danish-Polish Agreement Concerning Officials (Beamtenabkommen)).

423 Eg Wüger (n 104).

424 BGE 136 I 290, at 2.3.1. See also BGE 121 V 246, at 2 b).

if three conditions are fulfilled: (i) the act is sufficiently precise to be able to form the basis of a decision, (ii) it pertains to the rights and duties of individuals, and (iii) it is addressed to the law-applying (as opposed to the legislative) authorities.[425] In some cases, the Court only mentions some of these criteria (eg (i),[426] or (i) and (iii)),[427] which is problematic from the perspective of predictability, clarity, and consistency.

Countless rulings have dealt with the direct effect of written international law in the Swiss legal order, and it would be tedious (if at all feasible) to enumerate them. In this subsection, I highlight four particularly controversial and – in my view – problematic cases. They pertain to the ICESCR, the CEDAW, the 1972 Swiss–EEC Free Trade Agreement, and European social security law. I discuss Swiss courts' interpretation of treaties in general in Chapter 7 (*infra*).

The Swiss Federal Tribunal has often held that the ICESCR does not in principle have direct effect,[428] with the exception of art. 8(1)(a) ICESCR.[429] It has considered art. 2(2),[430] art. 3,[431] art. 7(d),[432] art. 9,[433] art. 11(1),[434] and art. 13(2)(b) and (c) ICESCR[435] to lack direct effect, and it has left open the direct effect of art. 8(1)(d)[436] and art. 13(2)(a) ICESCR.[437] This contradicts the statement of the UN Committee on Economic, Social and Cultural Rights that a lack of direct effect of some ICESCR provisions[438] is 'difficult to sustain', and that art. 2(3)(a)

425 BGE 124 III 90, at 3 a); BGE 120 Ia 1, at 5 b); Christine Kaufmann and Christoph Good, 'Die Anwendbarkeit von ILO-Recht vor Schweizer Gerichten: Potential und Grenzen' (2016) Aktuelle juristische Praxis / Pratique juridique actuelle 647, 647; Ziegler, 'The Application of WTO Law in Switzerland' (n 12) 395.

426 BGE 136 I 290, at 2.3.1.

427 BGE 124 II 293, at 4 b).

428 BGE 136 I 290, at 2.3.1; BGE 135 I 161, at 2.2; BGE 126 I 240, at 2 c); BGE 125 III 277, at 2 e); BGE 123 II 472, at 4 d); BGE 122 I 101, at 2 a); BGE 122 V 221, at 3 a); BGE 121 V 246, at 2 c); BGE 121 V 229, at 3 a).

429 BGE 122 V 221, at 3 a).

430 Ibid.

431 Ibid.

432 BGE 136 I 290, at 2.3.

433 BGE 139 I 257, at 6; BGE 135 I 161, at 2.2.

434 BGE 122 I 101, at 2 a).

435 BGE 120 Ia 1, at 5 d).

436 BGE 125 III 277, at 2 e). While the Court considered that there were 'weighty reasons' to consider the provision to have direct effect (at 2 d) bb)), it left the question open.

437 BGE 133 I 156, at 3.6.4.

438 Ie, art. 3, art. 7(a)(i), art. 8, art. 10(3), art. 13(2)(a), (3), and (4), and art. 15(3) ICESCR. See CESCR, *General Comment No 3: The Nature of States Parties' Obligations* (*art. 2, para 1, of the Covenant*), 14 December 1990, UN Doc E/1991/23, at para 5. See also CESCR, *General Comment No 9: The Domestic Application of the Covenant*, 3 December 1998, UN Doc E/C.12/1998/24, at para 10.

ICESCR requires that States provide effective judicial remedies.[439] As a matter of fact, the Committee has criticized the Swiss case law for systematically denying direct effect to most ICESCR rights.[440] Many scholars have criticized the Swiss case law, stating that there are in principle no obstacles to granting social rights direct effect.[441] It is also worth noting that several domestic socio-economic rights have direct effect in the Swiss legal order.[442]

A second illustration is provided by the CEDAW, which Switzerland ratified in 1997. The Swiss Federal Tribunal has held that art. 11(1)(e) CEDAW (pursuant to which States must treat women and men equally in terms of social security benefits) lacked direct effect.[443] It has also cited the Federal Council's statement that most provisions of the CEDAW lacked direct effect.[444] The Court did not challenge or reexamine the government's sweeping assessment, although the Federal Council had actually left open the possibility that the Swiss Federal Tribunal might grant direct effect to some CEDAW guarantees in the future.[445]

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439 CESCR, *General Comment No 3* (footnote 438), at para 5. See also CESCR, *General Comment No 9* (footnote 438), at para 2 and 3; and para 7, 10 (emphasizing the importance of justiciability), and 14.

440 CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding Observations: Switzerland*, UN Doc E/C.12/CHE/CO/2-3, 26 November 2010, at para 5.

441 See Maya Hertig Randall and Gregor T Chatton, 'Les droits sociaux en Suisse' in Krzysztof Wojtyczek (ed), *Social Rights as Fundamental Rights* (Eleven International Publishing 2016) 435 ff.

442 Jörg Künzli, Anja Eugster, and Alexander Spring, *Die Anerkennung justiziabler Rechte im Bereich der wirtschaftlichen, sozialen und kulturellen Menschenrechte durch das Bundes- und das kantonale Recht* (Schweizer Kompetenzzentrum für Menschenrechte 2014) 68 f. For an overview: Hertig Randall and Chatton (n 441) 439 ff.

443 BGE 139 I 257, at 6.

444 BGE 137 I 305, at 3.2. See also Federal Council, *Botschaft betreffend das Übereinkommen von 1979 zur Beseitigung jeder Form von Diskriminierung der Frau*, 23 August 1995, FG 1995 IV 901, at 925; Federal Council, *Botschaft über die Genehmigung des Fakultativprotokolls vom 6. Oktober 1999 zum Übereinkommen vom 18. Dezember 1979 zur Beseitigung jeder Form von Diskriminierung der Frau* (*OP CEDAW*), 29 November 2006, FG 2006 9787, at 9802 and 9813.

445 Federal Council, *Botschaft über die Genehmigung des Fakultativprotokolls vom 6. Oktober 1999 zum Übereinkommen vom 18. Dezember 1979 zur Beseitigung jeder Form von Diskriminierung der Frau* (*OP CEDAW*), 29 November 2006, FG 2006 9787, at 9802 (considering that the Swiss Federal Tribunal could accept the direct effect of 'at least some parts' of art. 9 CEDAW and art. 15 CEDAW, and 'potentially also' of art. 7 CEDAW and art. 16 CEDAW); Federal Council, *Botschaft betreffend das Übereinkommen von 1979 zur Beseitigung jeder Form von Diskriminierung der Frau*, 23 August 1995, FG 1995 IV 901, at 923 ff (noting that the issue of direct effect would have to be considered by the Swiss law-applying authorities, while stating its own view according to which most provisions of the CEDAW lacked direct effect).

In another context, with regard to the UN Convention on the Rights of Persons With Disabilities, the Federal Council has stressed that the law-applying authorities must determine direct effect on a case-by-case basis.[446] This suggests that the Court's deference to the government when interpreting the CEDAW is unwarranted, especially given that the Convention provides that States must provide effective judicial remedies. The Swiss judicial practice has been repeatedly deplored by the CEDAW Committee.[447] It is worth adding that the Swiss Federal Tribunal has denied the direct effect of other treaties aimed at protecting women.[448]

Another interesting example pertains to the 1972 Free Trade Agreement (FTA) between Switzerland and the EEC. For several decades, and in spite of widespread scholarly criticism,[449] the Swiss Federal Tribunal declined to grant direct effect to the FTA's provisions.[450] In 2005, however, the Court tacitly overruled its previous case law and applied the provisions of the FTA without even mentioning the issue of direct effect.[451] Daniel Wüger notes that the Federal Council had previously enjoined the Court to overrule its case law,[452] and that the Federal Appeals Commission for Customs, in a decision of 2001, had contradicted the Court on the very issue that the federal judges addressed in 2005.[453] In light of these facts, the Court's silence on direct effect

446 Federal Council, *Botschaft zur Genehmigung des Übereinkommens vom 13. Dezember 2006 über die Rechte von Menschen mit Behinderungen*, 19 December 2012, FG 2013 661, at 674.

447 Concluding Observations of the CEDAW Committee, UN Doc CEDAW/C/CHE/CO/4–5, 18 November 2016, at para 12 f; Concluding Observations of the CEDAW Committee, UN Doc CEDAW/C/CHE/CO/3, 7 August 2009, para 15; Concluding Observations of the CEDAW Committee, UN Doc A/58/38(SUPP), 18 August 2003, para 97 ff, at para 106 f.

448 The Court has denied direct effect to the International Agreements for the Suppression of the White Slave Traffic of 1904, 1910, 1921, and 1933 (BGE 128 IV 117, at 3 b)), as well as to the provisions of ILO Convention No 111 Concerning Discrimination in Respect of Employment and Occupation (BGE 106 Ib 182, at 4 a)).

449 Christina Schnell, *Arbeitnehmerfreizügigkeit in der Schweiz: Ausgewählte rechtliche Aspekte zum Personenfreizügigkeitsabkommen* (Schulthess 2010) 86; Thomas Cottier and Erik Evtimov, 'Die sektoriellen Abkommen der Schweiz mit der EG: Anwendung und Rechtsschutz' (2003) 139 Zeitschrift des Bernischen Juristenvereins 77, 101 ff.

450 BGE 104 IV 175, at 2 c); BGE 105 II 49, at 3 b); BGE 118 Ib 367, at 6 a).

451 BGE 131 II 271, at 10; Daniel Wüger, 'Bundesgericht wendet Freihandelsabkommen erstmals unmittelbar an – ein Schritt vorwärts, ein Schritt zurück' Jusletter of 4 April 2005.

452 See ibid 43.

453 VPB 66.44, decision of the Federal Appeals Commission for Customs, 29 August 2001, at 5 a) bb).

is disconcerting and raises the suspicion that the judges caved due to political pressure.

Yet another case where the Court suddenly flipped its approach to direct effect pertains to ILO Convention No 128 and to the European Code of Social Security.[454] In a 'spectacular'[455] turnaround, the Swiss Federal Tribunal overruled its (much criticized)[456] case law based on which these treaties had no direct effect. It granted direct effect to art. 32(1)(e) of the ILO Convention No 128 and art. 68(f) of the European Code of Social Security.[457]

In all four examples, the Swiss Federal Tribunal's approach to direct effect fails to convince. Its case law does not appear to follow a predictable, clear, and consistent method.

2.2.3.2 *Unwritten International Law*

The Swiss Federal Tribunal has barely ever dealt with the issue of whether unwritten international legal acts (ie, CIL and general principles of international law) have direct effect. The Court often mentions the notion of 'direct applicability', but uses it to refer to both direct effect and rank.[458] This makes it difficult to determine whether the Court is actually considering the issue of direct effect. The Court has stated that non-refoulement is a mandatory principle of international law that, *qua* CIL, has direct effect in the United States, yet the customary character of the principle was (as is often the case, *infra*, Chapter 8) only mentioned in passing.[459] In several decisions, the Court has noted that 'the general principles of international law are directly applicable in Switzerland *qua* domestic law'.[460] In most instances, however, it applies unwritten international law without examining its direct effect.[461] The direct effect of unwritten international law is also sidelined in Swiss legal

454 On this case law, see Hertig Randall and Chatton (n 441) 444 f.

455 See ibid 445.

456 Kaufmann and Good (n 425) 653.

457 BGE 119 V 171, at 4 b). See also BGE 120 V 224, at 2. Regarding art. 68(f) of the European Code of Social Security, see also BGE 121 V 45, at 1.

458 BGE 117 Ib 337, at 2 a); BGE 125 II 417, at 4 d); BGer, judgment 1A.63/2002 of 9 April 2002, at 2.1; Christian Dominicé, 'Le droit international coutumier dans l'ordre juridique suisse' in Jeanne Belhumeur and Luigi Condorelli (eds), *L'ordre juridique international entre tradition et innovation* (Graduate Institute Publications 1997) para 8.

459 BGer, judgment 1A.212/2000 of 19 September 2000, at 5 a).

460 BGE 117 Ib 337, at 2 a): 'Selon les conceptions en vigueur en Suisse, les principes généraux du droit des gens y sont directement applicables comme droit interne'. See also BGE 125 II 417, at 4 d); BGer, judgment 1A.63/2002 of 9 April 2002, at 2.1.

461 Wüger (n 104) 284.

scholarship,[462] as is the method based on which direct effect ought to be determined.[463]

2.2.3.3 *Concluding Remarks*

To summarize the findings of the previous subsections (2.2.3.1 and 2.2.3.2, *supra*), the Swiss Federal Tribunal has developed criteria based on which direct effect is determined. However, this test is anything but predictable, clear, and consistent, and it is not applied to unwritten international law. The Court does not appear to refer to art. 31 f VCLT when determining the direct effect of treaty provisions. A provision's (lack of) direct effect is often asserted without being carefully demonstrated.

Direct effect has implications for the State's duties towards individuals. Therefore, it is politically sensitive, especially regarding economic, social, and cultural rights.[464] The absence of a predictable, clear, and consistent method of determining direct effect creates the risk that courts will do so based on considerations that are unrelated to the legal act under scrutiny, including political pressure. In reality, courts routinely grant some treaty provisions direct effect, while consistently denying direct effect to others. The axiomatic character of Swiss judicial decisions on direct effect matches Forteau and Nollkaemper's findings that domestic courts seldom explain why an international legal act has or lacks direct effect[465] and that some rulings on direct effect seem 'fundamentally political'.[466] It also reflects what Nollkaemper calls the 'duality' of direct effect: domestic courts use direct effect either 'as a powerful sword that can pierce the boundary of the national legal order and protect individual rights', or as a way of 'shield[ing] the national legal order from the effects of international law'.[467]

The lack of a predictable, clear, and consistent method regarding direct effect makes it difficult for individuals to anticipate whether they can invoke an

462 See ibid 283–286; Simonetta Stirling-Zanda, *L'application judiciaire du droit international coutumier : étude comparée de la pratique européenne* (Schulthess 2000) 152 ff. See however Robert Baumann, *Der Einfluss des Völkerrechts auf die Gewaltenteilung: am Beispiel Deutschlands, Frankreichs, des Vereinigten Königreichs, der Vereinigten Staaten von Amerika, Schwedens und der Schweiz* (Schulthess 2002) 358 ff. See also Dominicé (n 458) para 16 ff.

463 Daniel Wüger for instance, in his study on the direct effect of international law in the Swiss legal order, merely states that the direct effect of CIL should be assessed 'no differently than that of treaty law'. Wüger (n 104) 286.

464 On social rights, see Hertig Randall and Chatton (n 441) 393.

465 Forteau (n 108) 105 f.

466 Nollkaemper, 'The Duality of Direct Effect of International Law' (n 59) 109.

467 See ibid 108.

international legal act in court. It is also problematic when courts clarify other aspects of the relationship between domestic and international law.

3 Legal Principles of Political Organization

The legal relationship between the State and other international legal subjects (*supra*, section 2) is not the only constraint on domestic courts' interpretation of international law. Judges are also limited by legal principles that structure the polity. In Switzerland, these principles include federalism (3.1), linguistic diversity (3.2), the rule of law (3.3), semi-direct democracy (3.4), and the supremacy of the federal legislature (3.5).

3.1 *Federalism*

Most States are unitary States. They are ruled by a central government which decides which powers it wants to delegate to the State's subunits. By contrast, Switzerland – like the United States, Germany, Austria, Belgium, India, and Russia, among other examples – is a federal State, ie, a State composed of sovereign units[468] (26 cantons) which have transferred some of their competences to the federal level (the Confederation).[469]

The Swiss cantons enjoy regulatory autonomy in some respects, while being subjected to federal law in others. On the one hand, the federal government, *qua* government of enumerated powers, can only exercise the powers delegated to it by the cantons.[470] Moreover, popular initiatives requesting a partial constitutional revision[471] and so-called 'mandatory referenda'[472] require a majority of both the people and the cantons. On the other hand, federal law overrides contrary provisions of cantonal law,[473] and the cantons must faithfully implement federal law[474] (which includes international law).[475]

468 Art. 3 Cst.

469 Wolfgang Rudolf, 'Federal States', *Max Planck Encyclopedia of Public International Law* (*Online Edition*) (Oxford University Press 2011) para 13 <opil.ouplaw.com>.

470 Art. 42(1) Cst. The principle of cantonal autonomy enjoys constitutional protection (art. 47), and State tasks must be allocated based on the principle of subsidiarity (art. 5a and art. 43a).

471 Art. 138(4) Cst.

472 Art. 140(1) Cst.

473 Art. 49(1) Cst. Eg BGE 141 V 455, at 6.1.

474 Art. 46(1) Cst.

475 Ehrenzeller, Schindler, and Schweizer (n 382) 1044.

From the perspective of international responsibility, the acts of federal subunits are attributable to the State.[476] Besides triggering a violation of their State's existing international obligations, cantonal laws and practices can hinder the ratification of treaties, or make it necessary for the State to add reservations upon ratification.[477] I address the structure of the cantonal judiciary in subsection 4.1.2 (*infra*).

A telling illustration of the challenges cantonal laws create from the perspective of international law (*inter alia* due to the sensitivity of cantonal prerogatives) is the constitutional ban on face-covering headgear which entered into force in the canton of Ticino on 1 July 2016, after being accepted in a cantonal popular vote in 2013.[478] One of the effects of the ban is that women are prevented from wearing burqas and niqabs in public.[479] Besides interfering with cantonal and federal constitutional law,[480] the ban contradicts Switzerland's international obligations to protect freedom of conscience and religion.[481]

476 Art. 4(1) ARSIWA. Various US States' repeated violations of foreign nationals' rights under the VCCR, for instance, have triggered the international responsibility of the United States. See ICJ, case concerning *Avena and Other Mexican Nationals* (*Mexico v. United States*), judgment, ICJ Reports 2004, 31 March 2004, 12.

477 Switzerland has for instance added a reservation to art. 25(b) ICCPR (which, *inter alia*, guarantees voting secrecy) to take into account some communal voting procedures and the cantonal 'Landsgemeinden', a secular voting tradition by show of hands still practiced in some cantons. See Federal Council, *Botschaft betreffend den Beitritt zur Schweiz zu den beiden internationalen Menschenrechtspakten von 1966 und zu einer Änderung des Bundesrechtspflegegesetzes*, 30 January 1991, FG 1991 I 1189, at 1201. This explains why Switzerland has signed, but not ratified Protocol 1 to the ECHR, art. 3 of which guarantees the right to free elections by secret ballot.

478 On this issue, see Samuele Vorpe, 'Das Burkaverbot im Lichte der Religionsfreiheit: Ist die Tessiner kantonale Verfassungsbestimmung über das Gesichtsverhüllungsverbot mit Art. 15 BV vereinbar?' Jusletter of 20 June 2016.

479 Federal Council, *Botschaft zur Gewährleistung der geänderten Verfassungen der Kantone Bern, Uri, Solothurn, Basel-Stadt, Basel-Landschaft, Appenzell Ausserrhoden, Appenzell Innerrhoden, Tessin, Waadt und Jura*, 12 November 2014, FG 2014 9091, at 9110.

480 Eg art. 15 Cst.

481 Eg art. 9 ECHR and art. 18 ICCPR. See however ECtHR (Grand Chamber), *S.A.S. v. France*, App No 43835/11 (ECHR Reports 2014), 1 July 2014. For an analysis of this decision, see Samantha Besson, 'Human Rights Waivers and the Right to Do Wrong Under the European Convention on Human Rights' in Josep Casadevall and others (eds), *Mélanges en l'honneur de / Essays in honour of Dean Spielmann* (Wolf Legal Publishers 2015). It is worth noting that in 2014, the AG-BS, in an exceptionally detailed ruling, confirmed the invalidity of an analogous cantonal constitutional initiative on these grounds. See AG-BS, judgment VG 2013.1 of 1 January 2014. The decision is also reported by Andreas Glaser, 'Teil 3: Demokratische Gesetzgebung im Gle ichheitsdilemma: Diskriminierungsverbot und Demokratie – ein Widerspruch?' in Béatrice Ziegler (ed), *Ungleichheit(en) und Demokratie* (Schulthess 2016) 145 f.

Nonetheless, in March 2015, the proposed amendment of the Constitution of the canton of Ticino obtained the Federal Assembly's seal of approval, the 'federal guarantee'.[482] In September 2018, 66.6% of voters in the canton of St. Gallen accepted to enshrine a similar ban in their cantonal law. As of June 2019, a popular vote on a federal ban on face-covering headgear was still pending.[483] It is worth noting that in October 2018, the Swiss Federal Tribunal partly granted two appeals lodged against the cantonal law implementing the Ticino ban.[484] The Court ordered that the law be amended so as not to disproportionately harm specific constitutional rights, ie, freedom of assembly, freedom of expression, and economic freedom. While it mentioned the S.A.S. ruling of the ECtHR,[485] the Swiss Federal Tribunal did not examine whether the cantonal law infringed freedom of religion, as the appellants had not invoked this provision.

3.2 *Linguistic Diversity*

From a comparative perspective, Switzerland's linguistic diversity is noteworthy. It impacts Swiss judges' activity in several respects.[486]

Linguistic diversity has been part of Switzerland's cultural identity since the mid-19th century.[487] It is protected by Swiss constitutional law, which states that Switzerland has four national languages: German, French, Italian, and Romansh.[488] A national language can be used to address the federal authorities, and individuals are entitled to receive an answer in this language.[489] Switzerland's official languages, on the other hand, ie, German, French, and Italian,[490] are the

482 Art. 51(2) and art. 172(2) Cst. See Federal Assembly, *Bundesbeschluss über die Gewährleistung der geänderten Verfassungen der Kantone Bern, Uri, Solothurn, Basel-Stadt, Basel-Landschaft, Appenzell Ausserrhoden, Appenzell Innerrhoden, Tessin, Waadt und Jura*, 11 March 2015, FG 2015 2035.

483 <www.admin.ch/ch/f/pore/vi/vis465.html>.

484 BGE 144 I 281.

485 Ibid, at 3.2.

486 Of course, linguistic diversity also influences the activity of other Swiss officials, eg *qua* criterion for the election of the members of the Federal Council (art. 175(4) Cst).

487 Georges Lüdi, 'Mehrsprachigkeit', *Historisches Lexikon der Schweiz / Dictionnaire historique de la Suisse / Dizionario storico della Svizzera* (2013) <www.hls-dhs-dss.ch/textes/d/D24596.php>.

488 Art. 4 Cst. On linguistic diversity and law in Switzerland, see Niccolò Raselli, 'Langues et justices dans un Etat plurilingue' (2016) Aktuelle juristische Praxis / Pratique juridique actuelle 639.

489 Art. 6(3) FA-NL.

490 Art. 70(1) Cst.

languages in which federal legislation is published.[491] All three linguistic versions enjoy the same legal authority.[492]

Linguistic diversity is one criterion for constituting the chambers of the Swiss Federal Tribunal.[493] Legal briefs submitted to the Court must be written in an official language,[494] and judicial proceedings take place in one of the four national languages.[495] This linguistic variety can create inconsistencies in the case law when a legal issue is addressed differently in proceedings conducted in different languages. Judges predominantly working in a specific language (as well as their clerks) might for example be biased in terms of the scholarship they resort to. Language can hence partly explain variations in the way Swiss courts interpret international law. On the other hand, and like judges in other multilingual States (eg Belgium, South Africa, and Canada), Swiss judges are familiar with the interpretive difficulties that may be triggered when legal acts are available in several authoritative linguistic versions. Such linguistic discrepancies are liable to arise, *mutatis mutandis*, in the context of treay law with different, yet equally authoritative linguistic versions.[496]

3.3 *The Rule of Law*

Art. 5 Cst., entitled 'rule of law',[497] was adopted in the constitutional revision of 1999. It codifies a previously 'unwritten principle of Swiss constitutional law'[498] which, according to the Swiss Federal Tribunal, 'impregnate[s] the Swiss constitutional order'.[499] When referring to this concept, I am addressing the *legal* principle of the rule of law. I am not looking at the moral principle

491 Art. 10(1) and art. 11 FA-NL.

492 Art. 14 FA-CFLFG.

493 Art. 18(2) FA-SFT.

494 Art. 42(1) FA-SFT.

495 Art. 54(1) FA-SFT. The Act refers to 'official languages' as including Romansh, which contradicts art. 70(1) Cst.

496 For examples of inconsistencies between different linguistic versions of a treaty, see BGE 102 Ia 179, at 3 a) (ECHR); BGE 83 I 16, at 3 (Refugee Convention); BGE 98 II 231, at 4 (Warsaw Convention). See also Marie-Louise Gächter-Alge, *Mehrsprachigkeit im Völkervertragsrecht: Von der Ausarbeitung zur Auslegung* (Difo-Druck 2011).

497 <www.admin.ch/opc/en/classified-compilation/19995395/201601010000/101.pdf> (unofficial translation).

498 Federal Council, *Botschaft über eine neue Bundesverfassung*, 20 November 1996, FG 1997 I 1, at 131 f, with reference to BGE 103 Ia 369 (see especially at 6) and BGE 121 I 22 (see at 3 a)).

499 BGE 139 I 16, at 4.3.2.

of the rule of law, nor am I analyzing how its respective conceptualizations in continental[500] versus common law[501] jurisdictions relate.[502]

The Swiss constitutional principle of the rule of law is four-pronged. It provides that State activities 'are based on and limited by law' (para 1), that State action must be proportionate (para 2), that State authorities must act in good faith (para 3) and, finally and importantly, that the Confederation and the cantons must 'respect international law' (para 4). Art. 5(1) and (4) are particularly interesting from the perspective of domestic courts' interpretation of international law. Art. 5(1) Cst. (the principle of legality)[503] requires that State authorities abide by the law[504] and that their activity be traceable to a (sufficiently determinate)[505] legal basis.[506] It is not a self-standing constitutional right and must be invoked jointly with the principle of the separation of powers, the prohibition of arbitrariness, or specific constitutional rights, for instance.[507]

500 Scholars have used the notion of the 'legal State' to distinguish the continental conception of the rule of law from the rule of law as conceptualized in Anglo-American legal theory. See Stephan Kirste, 'Philosophical Foundations of the Principle of the Legal State (Rechtsstaat) and the Rule of Law' in James R Silkenat, James E Hickey, and Peter D Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State* (*Rechtsstaat*) (Springer 2014). Moreover, Swiss scholars differentiate between the Swiss conception of the rule of law (or 'legal State') and the principle of the 'Rechtsstaat' or 'Etat de droit' as articulated in continental political philosophy, see Ehrenzeller, Schindler and Schweizer (n 382) 105. This gives credence to Kirste's observation that the principle of the rule of law/of the legal State branches out into diverse conceptions adopted by different domestic legal orders, based on a given State's history and dominating moral and political philosophy.

501 Raz, 'The Rule of Law and Its Virtue' (n 18); Lamond (n 206); Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James Fleming (ed), *Getting to the Rule of Law* (New York University Press 2011) 5 f; Finnis (n 79) 270 f.

502 According to Stephan Kirste, even if the historical, cultural, and ideological contexts of their respective emergence differ, both concepts pursue a 'common goal'. In both cases, their philosophical justification lies in the protection of individual freedom. See Kirste (n 500). On the rule of law in international law, see Wohlwend (n 17).

503 BGE 131 II 13, at 6.3.

504 'Vorrang des Rechts', see BGE 91 I 266, at 7; BGE 104 Ib 74, at 5 b) bb). See also BGE 141 V 557, at 5.2 (applicable to private individuals exercising a public function, *in casu* a private company providing compulsory health insurance services).

505 BGE 109 Ia 273, at 4 d). According to the Court, the requirement of legal determinacy aims at preventing that the law-applying authorities make 'unnecessarily substantial value judgments'.

506 'Vorbehalt des Rechts', see BGE 82 I 21, at 3 a); BGE 106 Ia 277, at 3 d). Regarding taxes and fees: BGE 95 I 243, at 4 a); BGE 83 I 81, at 5; BGE 84 I 89, at 2. See however BGE 112 Ia 18, at 3 b). On these two aspects, see Federal Council, *Botschaft über eine neue Bundesverfassung*, 20 November 1996, FG 1997 I 1, at 132.

507 BGE 136 I 241, at 2.5.

Art. 5(4) (the principle of the international rule of law)[508] requires that State authorities (including courts) 'respect' (and, though not explicitly stated, apply)[509] international law. The provision has regularly been invoked by the Swiss Federal Tribunal to highlight the applicability of international law and to justify its supremacy over domestic law.[510]

The constitutional principle of the rule of law is complemented by the prohibition of arbitrariness (art. 9 Cst.) and the principle of good faith (art. 5(3) and 9 Cst.). Arbitrariness, which art. 9 Cst. prohibits, is, according to the Swiss Federal Tribunal, 'the negation of [the] principle [of the rule of law]'.[511] Another concretization of the constitutional principle of the rule of law is the right of individuals to have their case reviewed by an independent, impartial court.[512] All these provisions apply to and constrain Swiss courts' interpretation of international law. It is worth noting that judicial independence, impartiality, and respect for the law are also mandated by Switzerland's international obligations, especially art. 6 ECHR and art. 14 ICCPR. Litigants often invoke them jointly with domestic constitutional law before Swiss courts.[513]

3.4 *Semi-Direct Democracy*

Switzerland is a semi-direct democracy. Its political structure is characterized by elements of direct and representative democracy, both at the cantonal and federal level. It is especially due to its mechanisms of direct democracy – on which I focus in this subsection – that the Swiss political system stands out from a comparative perspective.

On the federal plane, instruments of direct democracy include the popular initiative and the referendum. It is important to stress that the word 'referendum' has a specific meaning under Swiss law that differs from the usage of this term in scholarship outside Switzerland. Popular initiatives give Swiss voters the possibility to request a total or partial revision of the Constitution.[514] Mandatory and optional referenda require or allow voters to decide certain issues in a popular vote.[515] Referenda are required, *inter alia*, in the context of 'accession to organizations for collective security or to supranational

508 Ehrenzeller, Schindler, and Schweizer (n 382) 130.
509 See ibid.
510 BGE 139 I 16, at 5.1.
511 ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, App No 5809/08 (ECHR Reports 2016), 21 June 2016, para 145.
512 Art. 30(1) Cst; see also art. 29, 29a, and art. 191c Cst.
513 BGE 137 I 128, at 4; BGE 133 II 450, at 7.3.
514 Art. 138 f Cst.
515 Art. 140 f Cst.

communities'.[516] Both the referendum and the popular initiative also exist at the cantonal and subcantonal level. The cantons of Geneva,[517] Zurich,[518] Basel-Stadt,[519] and Bern[520] (the case law of which is included in this study, see *infra*, 4.1.2) all provide for mandatory and optional referenda, popular constitutional initiatives, and popular legislative initiatives, both at the cantonal and at the municipal level. Some of these cantonal instruments are even designed to address issues of international law.[521]

On the one hand, scholars point out that governments can 'lock in' domestic constituencies by entering into treaties from which these constituencies cannot opt out.[522] On the other hand, recent examples show that referenda, even if they are not binding from the perspective of international law, influence the relationship between the domestic legal order and international law. They can even lead to a renegotiation of (or to a withdrawal from) treaties. The 'Brexit' vote of 23 June 2016 (which, in and of itself, is not even legally binding under UK law) is a case in point. Another example is Swiss voters' decision, on 9 February 2014, to introduce a cap on foreign immigration.[523] The outcome of this vote conflicts with the Swiss–EU Agreement on the Free Movement of Persons.

Federal popular initiatives increasingly challenge Switzerland's international obligations. Out of the 22 constitutional initiatives accepted by Swiss voters (status as of June 2019), the first of which dates back to 1893, 10 were adopted between 2002 and 2014.[524] Some of these votes have modified Switzerland's foreign relations in a fundamental way. On 3 March 2002, for instance, Swiss voters approved Switzerland's accession to the UN.[525] Other votes have created tensions with the State's obligations on the international plane, eg the 2004

516 Art. 140(1)(b) Cst.

517 Art. 56 ff Cst-GE.

518 Art. 22 ff Cst-ZH.

519 Art. 44 ff Cst-BS.

520 Art. 55 ff Cst-BE.

521 Art. 23(e) Cst-ZH, for instance, provides that popular initiatives can request that negotiations be started regarding the conclusion, amendment, or termination of an intercantonal or international agreement that is subject to a referendum.

522 Tom Ginsburg, 'Locking in Democracy: Constitutions, Commitment, and International Law' (2006) 38 NYU Journal of International Law and Politics 707, 712.

523 <www.admin.ch/ch/f/pore/vi/vis413.html>.

524 See also Council of States, Political Institutions Committee, *Requirements as Regards the Validity of Popular Initiatives, Analysis of the Need for Reform*, FG 2015 7099, at 7102. For a similar diagnosis: Cesla Amarelle, 'Législation au forceps et sous la pression du temps à la lumière des initiatives populaires' (2014) 25 LeGes 419.

525 <www.admin.ch/ch/d/pore/vi/vis292.html>.

vote in favor of the 'life-long imprisonment of extremely dangerous and non-reformable criminals',[526] or the 2009 ban on the construction of minarets.[527]

One reason for this trend is the extremely deferential review exercised by the Federal Assembly when it examines the substantive validity of constitutional popular initiatives.[528] Initiatives must be declared invalid 'in whole or in part' if they violate 'the requirements of consistency of form, and of subject matter, or [...] mandatory provisions of international law'.[529] Moreover, they cannot be manifestly impracticable.[530] Since the creation of the constitutional initiative, in 1891, the Federal Assembly declared a popular initiative invalid as a whole only four times,[531] and only once because it considered that an initiative breached mandatory provisions of international law.[532] It partially invalidated the 'enforcement initiative' due to its narrow definition of *jus cogens*.[533] Several proposals to reform the conditions of the validity of constitutional initiatives have been rejected by the Federal Assembly, including proposals to involve the Swiss Federal Tribunal via advisory opinions.[534] It is worth noting that in a landmark case decided in April 2019, the Court invalidated a federal

526 <www.admin.ch/ch/f/pore/vi/vis294.html>. The vote challenges procedural guarantees protected, *inter alia*, by art. 5(4) ECHR.

527 <www.admin.ch/ch/f/pore/vi/vis353.html>. This ban is problematic from the perspective of art. 9 ECHR, among other provisions.

528 Other reasons identified by the Political Institutions Committee of the Council of States include societal tensions, the use of popular initiatives for electoral purposes, and the expansion of the scope of international law binding upon Switzerland. See FG 2015 7099, at 7113.

529 Art. 139(3) Cst. See also art. 98 FA-FA.

530 Giovanni Biaggini, *BV Kommentar: Bundesverfassung der Schweizerischen Eidgenossenschaft* (2nd edn, Orell Füssli 2017) 1098 f.

531 Ie, the initiative for the 'temporary reduction of military expenditures (weaponry truce)' (1955), the initiative against 'high costs of living and inflation' (1977), and the initiative for 'lower military expenditures and a stronger peace policy' (1995). I am indebted to Camilla Jacquemoud for her input on this topic.

532 In 1996, the Federal Assembly invalidated the initiative for a 'reasonable asylum policy' (Federal Assembly, *Federal Decree on the Popular Initiative 'For A Reasonable Asylum Policy'*, 14 March 1996, FG 1996 I 1355).

533 Federal Assembly, *Federal Decree on the Popular Initiative 'For the Enforcement of the Expulsion of Foreign Criminals* (*Enforcement Initiative*)', 20 March 2015, FG 2015 2701.

534 Council of States, Political Institutions Committee, *Requirements as Regards the Validity of Popular Initiatives, Analysis of the Need for Reform*, FG 2015 7099, at 7111 f. The Federal Assembly and the Federal Council considered that entrusting the Court with such a role would interfere with the separation of powers and introduce constitutional review through the backdoor: FG 2015 7099, at 7111 f. See also Federal Council, *2010 Report on International and Domestic Law* (n 143), at 2326 ff.

popular vote for the first time in its history, on the grounds that the federal government had provided incorrect information ahead of the vote.[535]

A range of initiatives have explicitly addressed Switzerland's relationship to international law. Examples include the (unsuccessful) initiative requiring a popular vote for the ratification of specific international treaties,[536] or the (equally unsuccessful) initiative on 'self-determination', which proposed to introduce the supremacy of Swiss constitutional law over international law, except for mandatory provisions of international law.[537] Some proposals did not gather the required number of signatures to be put to vote, eg the initiative on Swiss neutrality,[538] the initiative 'for an EU accession moratorium', which demanded that no negotiations on EU accession be conducted for at least ten years,[539] and yet another initiative requesting that the UDHR be part of the Swiss Constitution.[540]

In recent years, political parties and interest groups have used the instruments of direct democracy in ways that have tended to exacerbate the tensions between Swiss law and international law. These tensions also come to the fore in cases brought before Swiss courts. The political sensitivity of these issues makes it even more important that Swiss courts, when they interpret international law, respect its interpretative methods, and that they reason predictably, clearly, and consistently.

3.5 *The Federal Assembly* qua *'Supreme Authority of the Confederation'*

An important feature of the Swiss case law is that courts tend to defer to the federal legislature (the Federal Assembly), be it with regard to domestic legal issues or with regard to international law (on this last point, see also *infra*, 4.2.2.2). Indeed, the Swiss Constitution provides that '[s]ubject to the rights of the People and the Cantons, the Federal Assembly is the supreme authority of the Confederation'.[541]

The bicameral structure[542] of the Federal Assembly is inspired by the US political system. While the National Council[543] represents the interests of the people (its 200 seats being allocated proportionally to the Swiss cantons'

535 BGer, judgment 1C_338/2018 of 10 April 2019 (to be published in the official compendium). See also BGer, judgments 1C_315/2018, 1C_316/2018, 1C_329/2018, 1C_331/2018, 1C_335/2018, 1C_337/2018, 1C_339/2018, and 1C_347/2018 of 10 April 2019.

536 <www.admin.ch/ch/d/pore/vi/vis363.html>.

537 <www.admin.ch/ch/d/pore/vi/vis460t.html>.

538 <www.admin.ch/ch/d/pore/vi/vis416.html>.

539 <www.admin.ch/ch/d/pore/vi/vis395.html>.

540 <www.admin.ch/ch/d/pore/vi/vis389.html>.

541 Art. 148(1) Cst.

542 Art. 148(2) Cst.

543 Art. 149 Cst.

respective populations), the Council of States[544] encompasses two representatives per canton (and, if applicable, one per half-canton). In addition to adopting federal acts,[545] the Federal Assembly appoints high officials at the federal level,[546] and it exercises oversight over the other federal branches.[547] It is tasked with various further issues (eg taking measures to enforce federal law, and ruling on the validity of popular initiatives),[548] and it has other residual federal powers not entrusted to any other federal authority.[549] One major expression of the supremacy of the federal legislature is that federal acts are immune from judicial review[550] (see also *supra*, 2.2.2).

Considering this legislative supremacy, Swiss courts usually show deference towards the federal legislature, even when federal acts appear to violate constitutional or international law. This is in stark contrast to courts' activism in other States with constitutional review. Moreover, considerations of democratic legitimacy frequently surface in Swiss rulings.[551] The Swiss Federal Tribunal has stressed that judicial proceedings be transparent, so that court decisions are subject to a 'democratic check'.[552] In a cantonal case pertaining to life-long internment, the President of the District Court of Weinfelden is reported to have stated that the court 'must respect the will of the people and is prohibited from circumventing it with legal tricks and stratagems'.[553] As I will emphasize, another manifestation of the importance accorded to democratic legitimacy is that Swiss judges are appointed by the legislature or, in some cases, by the people (*infra*, 4.2.4).

Democratic legitimacy should be a pivotal concern for Swiss judges given the commitment of the Swiss legal order to democratic principles. This

544 Art. 150 Cst.

545 Art. 163 ff Cst.

546 Art. 168(1) Cst.

547 Art. 169 Cst.

548 Art. 173(1) Cst.

549 Art. 173(2) Cst.

550 Art. 190 Cst.

551 BGE 125 I 119, at 3 d); BGE 125 I 209, at 8 a) (comparing the requirements in terms of impartiality of members of the executive, on the one hand, and of judges, subject to art. 6(1) ECHR, on the other hand); BGE 131 I 333, at 4.3, and BGE 135 I 233, at 2.1 (on the required democratic legitimacy of a municipal legislative act). Constitutional provisions enjoy a high degree of democratic legitimacy due to their enactment procedure, see BGE 133 I 110, at 6.2. Democratic legitimacy is also very often mentioned by the Court in relation to the freedom of vote, see for instance in BGE 140 I 394, at 8.2.

552 BGE 139 I 129, at 3.3.

553 Alex Baur, 'Wenn Juristen das Recht biegen' *Die Weltwoche* (2010) <www.weltwoche.ch/ausgaben/2010_48/artikel/artikel-2010-48-kommentar-wenn-juristen-das-recht-biegen.html>.

commitment is also reflected in some of Switzerland's international obligations, especially in the ECHR. On the other hand, as is well known, democratic legitimacy is not the sole vector of political legitimacy. Democracy requires to be complemented by fundamental rights, some of which are protected by international law. Otherwise, democracy becomes tyrannical. When weighing these potentially conflicting considerations, and given the sensitivity of the issue, judges may be tempted to give in to political pressure. To mitigate this risk, lawful and high-quality judicial reasoning is key (*infra*, Chapter 5).

4 The Swiss Judiciary

The domestic judicial practice of international law cannot be fully grasped without at least a basic understanding of the domestic judicial system under scrutiny. After clarifying the structure of the Swiss judiciary (4.1), I flesh out the most relevant characteristics of Swiss courts' activity from the perspective of the topic of this book (4.2).

4.1 *The Structure of the Swiss Judiciary*

In this subsection, I explain how the Swiss judiciary is structured, both on the federal level (4.1.1) and in the four cantons which I use as case studies (4.1.2). These remarks will help us understand the legal powers and characteristics of various Swiss courts, and why these courts' case law is of interest to a study about international law.

4.1.1 Federal Courts

Besides the Swiss Federal Tribunal (4.1.1.1), the Swiss federal judiciary[554] encompasses the Federal Administrative Court (4.1.1.2), the Federal Criminal Court (4.1.1.3), and the Federal Patent Court. Due to its narrow jurisdiction[555] and to the marginal relevance of international law to its activity, the Patent Court is left out of this book. The case law of the two other judicial bodies is considered to the extent that it provides insights into international legal issues. Because of the relatively young age of these two bodies, the number of available cases is significantly limited compared to those of the Swiss Federal Tribunal. I do not consider the decisions of appeals commissions (or other quasi-judicial bodies) subsequently replaced by courts in the course of the reform of the judiciary in the early 2000s.

554 <www.eidgenoessischegerichte.ch>.

555 Art. 26 FA-FPC.

4.1.1.1 *The Swiss Federal Tribunal*

In this book, I often highlight the practice of the Swiss Federal Tribunal, although the decisions of other federal (*infra*, 4.1.1.2 and 4.1.1.3), cantonal (*infra*, 4.1.2), and military courts (*infra*, 4.1.3) are also taken into account (see especially Chapters 7 and 8, *infra*). I emphasize the case law of the 'supreme judicial authority of the Confederation'[556] for several reasons.

First, while all Swiss courts have jurisdiction over international legal issues and are hence liable to trigger the State's international responsibility, the Swiss Federal Tribunal arguably enjoys the highest interpretive authority on the domestic plane. It is also the most authoritative expression of the Swiss practice of international law, at least as regards the interpretation of federal law (a notion which, under Swiss law, includes international law).[557] This should not detract from the fact that other federal courts (and federal authorities) have the same legal authority to interpret federal law, unless the Swiss Federal Tribunal acts within its powers to review their decisions. Second, the case law of the Swiss Federal Tribunal spans over many decades, contrary to that of other federal courts established in the early 2000s. The Swiss Federal Tribunal's practice is hence particularly suited to an in-depth and representative analysis. A third reason is the breadth of the Court's jurisdiction, which explains the richness of its case law from the perspective of international law. Lastly, from a practical perspective, the Swiss Federal Tribunal's case law is easily accessible, and the Court has the most elaborate search engine of all Swiss courts (see Chapters 7 and 8, *infra*).

As regards its internal organization, the Court has seven chambers (or divisions). Two of them specialize in public law, two in civil law, one in criminal law, and two in social insurance law.[558] While international law is particularly likely to be invoked in public law cases, the other chambers are frequently confronted with such issues as well.[559] The Swiss Federal Tribunal counts 38 full-time judges and 19 part-time judges. Judges are elected by the Federal Assembly (see also *infra*, 4.2.4).[560] Any individual holding the right to vote at the federal level is eligible.[561] Federal judges serve for a six-year term.[562] They can

556 Art. 188(1) Cst.

557 Ehrenzeller, Schindler, and Schweizer (n 382) 1044.

558 <www.bger.ch/index/federal/federal-inherit-template/federal-gericht/federal-gerichts-abteilungen.htm>.

559 Eg BGE 136 III 168. See also Ammann, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (n 5).

560 Art. 5(1) FA-SFT, art. 135 FA-FA.

561 Art. 5(2) FA-SFT; art. 136(1) Cst.

562 Art. 9(1) FA-SFT.

be reelected an unlimited number of times, until they reach the age of 68.[563] As of June 2019, the Court employed 153 law clerks.[564]

I analyze the Court's jurisdiction with respect to international legal issues in subsection section 4.2.1 (*infra*).

4.1.1.2 *The Swiss Federal Administrative Court*

The Swiss Federal Administrative Court (SFAC) started its activity in 2007. It was created as part of the reform of the Swiss judiciary, in 2000.[565]

The Court is divided into six chambers. The third chamber (which handles cases dealing with social insurance and public health), the fourth and fifth chambers (which examine asylum law cases), and the sixth chamber (which deals with cases pertaining to the legislation on foreign nationals) are particularly significant for present purposes. However, all chambers are liable to be confronted with international legal issues. The judges are elected by the Federal Assembly for a six-year term.[566] At the end of 2018, the Court counted 76 judges, who were assisted by 238 clerks.[567]

The Court has jurisdiction to review challenges against the decisions of specific federal authorities.[568] Such decisions sometimes pertain to Swiss foreign relations and to Switzerland's international obligations. Violations of (directly applicable) international legal acts are 'violations of federal law' that can be appealed to the Court.[569] The Court's case law can be expected to provide insights into the interpretation of international immigration and refugee law, DTAs, and various other bilateral agreements (eg treaties on the recognition and enforcement of foreign judgments, and treaties on mutual legal assistance).

4.1.1.3 *The Swiss Federal Criminal Court*

The Swiss Federal Criminal Court (SFCC) started its activity in 2004. Like the SFAC, it was established in the context of the reform of the Swiss judiciary.[570]

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563 Art. 9(2) FA-SFT.

564 <www.bger.ch/index/federal/federal-inherit-template/federal-richter/federal-richter-gerichtsschreiber.htm>.

565 Art. 191a(2) Cst.

566 Art. 5(1) and art. 9(1) FA-SFAC.

567 See the SFAC's annual report for 2018, <www.bvger.ch/bvger/fr/home/le-tribunal-administratif-federal/rapports-de-gestion.html>.

568 Art. 5 FA-FAP; art. 31 ff FA-SFAC.

569 Art. 49(a) FA-FAP. Eg Elias Hofstetter and Oliver Zibung, 'Art. 49' in Bernhard Waldmann and Philippe Weissenberger (eds), *Praxiskommentar zum Bundesgesetz über das Verwaltungsverfahren* (Schulthess 2009) 977.

570 On this reform, see Federal Council, *Botschaft zur Totalrevision der Bundesrechtspflege*, 28 February 2001, FG 2001 4202. The Federal Council notes that the reform takes

The Court is divided into a Criminal Law Chamber and an Appellate Chamber. As of June 2019, the Court was staffed by 20 regular judges[571] and 10 substitute judges.[572] The judges are elected by the Federal Assembly for a six-year term.[573]

The SFCC[574] has jurisdiction over several international legal issues, including claims pertaining to international legal assistance[575] and violations of ICL, IHL, and IHRL.[576] Its case law can especially provide insights into the interpretation of CIL and into specific substantive areas of international law, such as the law of immunities.

4.1.2 Selected Cantonal Courts

As previously mentioned, Switzerland is a federal State that counts 26 cantons (*supra*, 3.1). The cantons have their own political and legal institutions, including their own judiciary, usually composed of several district courts and of a cantonal supreme court. The decisions of cantonal courts can only be reviewed by the Swiss Federal Tribunal on specific grounds, which include alleged violations of federal and international law.[577]

International legal scholarship dealing with the case law of lower courts is scarce. International lawyers typically focus on the decisions of higher domestic courts. They likely do so because of the greater interpretive authority of these decisions from the perspective of domestic law and, hence, *qua* expression of the State's practice on international law,[578] especially when these higher courts overrule the decisions of lower courts on issues of international law.[579]

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international law into account, 'the implementation of which is increasingly part of the tasks of the Swiss judge' (ibid 4475). By creating an appeal in federal criminal matters, Switzerland was able to withdraw its reservation to art. 14(5) of the ICCPR and to respect the requirements of art. 2 of Protocol 7 to the ECHR. See ibid at 4476.

571 <www.bstger.ch/de/il-tribunale/giudici/elenco-giudici-penali-federali.html>.

572 <www.bstger.ch/de/il-tribunale/giudici/elenco-giudici-supplenti.html>.

573 Art. 42(1) and 48(1) FA-OFCA.

574 <www.bstger.ch>.

575 Art. 37(2)(a) FA-OFCA.

576 Art. 23 f of the Swiss Criminal Procedure Code of 5 October 2007 (SR 312.0).

577 Art. 95(b) FA-SFT. See also Federal Council, *Botschaft zur Totalrevision der Bundesrechtspflege*, 28 February 2001, FG 2001 4202, at 4335.

578 ILC, 'Second Report on Identification of Customary International Law by Special Rapporteur Sir Michael Wood' (2014) UN Doc A/CN.4/672 25, para 41 e.

579 One example is the decision of the Greek Supreme Court in *Distomo*, stating that Germany enjoyed no State immunity for war crimes. The decision was subsequently overruled by the Greek Special Supreme Court in *Margellos*, a decision followed by other Greek courts.

Moreover, in some States, scholars note that international law is more often invoked in the higher courts than at the lower levels.[580]

Ignoring lower courts is unjustified, however. First, not all lower court cases dealing with international law reach the highest courts, either because these courts lack jurisdiction or simply because no appeal is lodged.[581]

Second, lower courts play an important role in the implementation of federal law and, hence, of at least some areas of international law, eg IHRL.[582] A related reason that justifies consulting the case law of lower courts is its quantitative importance compared to that of higher courts: a significant share of a State's 'judicial business' is conducted in the lower courts.[583]

Third, lower courts' case law is of interest when it departs from the established case law in a given State or on the international plane. Although such unorthodox rulings are unlikely to speak authoritatively for the State and, hence, to contribute to State practice on the international plane, they can influence the case law of other courts in later cases. As highlighted by Louis Brandeis, federal subunits are analogous to 'laboratories' where experimentations are (for better or worse) carried out.[584] As a matter of fact, Simonetta Stirling-Zanda, in her analysis of the determination of CIL in selected European courts, observes that lower courts are often 'bolder and more progressive' in their reasoning than higher courts.[585] In Switzerland, for instance, the Administrative Court of the canton of St. Gallen has adopted a particularly international law-friendly approach to the issue of reverse discrimination of

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The ICJ concluded that *Distomo* was of 'limited precendential value', Petersen (n 73) 20. See ICJ, *Jurisdictional Immunities of the State* (*Germany v. Italy; Greece intervening*), judgment, ICJ Reports 2012, 3 February 2012, 99, at 134, para 76.

580 Hegde (n 46) 56.

581 As David Zaring notes with regard to the US judiciary, many scholars focus on the application of international law by the US Supreme Court although '[t]he chance that any case will end up in the Supreme Court [...] is today infinitesimal'. David Zaring, 'The Use of Foreign Decisions by Federal Courts: An Empirical Analysis' (2006) 3 Journal of Empirical Legal Studies 297, 305. See also ILC, 'Fifth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (n 295) 25 f para 56.

582 Samantha Besson and Eva Maria Belser (eds), *La Convention européenne des droits de l'homme et les cantons / Die Europäische Menschenrechtskonvention und die Kantone* (Schulthess 2014).

583 See (for the United States): Thomas R Phillips, 'State Supreme Courts: Local Courts in a Global World' (2003) 38 Texas International Law Journal 557, 557.

584 *New State Ice Co. v. Liebmann,* 285 U.S. 262 (1932), at 311. This expression has also been used in Swiss legal scholarship, see for instance Hertig Randall and Chatton (n 441) 405 f.

585 Stirling-Zanda (n 102) 5.

Swiss nationals.[586] Of course, the highest court of a legal order may set limits on these idiosyncratic interpretations to secure hermeneutic uniformity.

Fourth, although fact-finding is not the focus of this study,[587] it is important to note that lower courts play an important role in establishing the facts of a case, while higher courts usually review them under narrow circumstances only.[588]

Fifth, even when it does not deal with issues of international law, the case law of federal subunits can be of interest because federalism relies on concepts that also exist, *mutatis mutandis*, at the international level. Examples include the principle of subsidiarity, self-determination, and territorial integrity, and cases pertaining to intercantonal agreements.[589]

In light of these reasons, the present analysis includes the decisions of Swiss cantonal courts to the extent they are relevant from the viewpoint of international law.[590] For reasons of feasibility, I have focused on the decisions of the highest courts of the cantons of Geneva (4.1.2.1),[591] Zurich (4.1.2.2),[592] Basel-Stadt (4.1.2.3),[593] and Bern (4.1.2.4).[594] This choice is due to these cantons' demographic and socio-economic importance, but also to the existence of IOs, diplomatic representations, and multinational corporations on their territory. Hence, international law can be expected to have practical relevance in these cantonal jurisdictions. Moreover, most of the recent[595] case law of the highest courts of these cantons is accessible online in full-text mode, even if

586 The Court has made a teleological interpretation of art. 42(2) FA-FN, *inter alia* in light of art. 8 and 14 ECHR. See VwGer-SG, decision B 2011/74 of 6 July 2011 (published in GVP 2011:1), at 2.8.

587 Of course, as I will emphasize, the interpretation of many international legal acts requires an empirical inquiry, eg to ascertain State practice and *opinio juris* (Chapter 8, *infra*). This specific fact-finding role of courts will be considered.

588 Regarding Switzerland, see art. 97 FA-SFT.

589 In Switzerland, for example, the efforts of some separatist forces in the canton of Bern to join the canton of Jura raise issues in terms of the right to self-determination and of the territorial integrity of the Swiss cantons. See BGE 117 Ia 233, at 4 c).

590 See the list of cantonal courts available at <www.bger.ch/fr/index/press/press-inherit-template/press-jurisdiction-links/press-jurisdiction-links-gerichte-schweiz.htm>.

591 <ge.ch/justice/cour-de-justice>.

592 <www.gerichte-zh.ch/entscheide/entscheide-anzeigen.html>.

593 <www.rechtsprechung.gerichte-bs.ch>.

594 <www.justice.be.ch/justice/de/index/entscheide/entscheide_rechtsprechung/entscheide.html>, <www.openjustitia.apps.be.ch/alfresco/extension/openjustitia/search/advanced/search.xhtml> (for the OGer-BE and VwGer-BE, respectively).

595 One exception pertains to the decisions of the AG-BS, the availability of which is more limited.

the searches can be laborious due to the characteristics of some cantonal databases.[596] The case law of other cantonal and district courts was not surveyed systematically. It was occasionally considered based on case reports published in Swiss legal journals, and based on search results in the Swisslex database.[597]

The following subsections briefly describe the structure and functioning of the aforementioned cantonal courts.

4.1.2.1 *The Supreme Court of the Canton of Geneva*

The Supreme Court (Cour de justice) is the highest court of the canton of Geneva. It is divided into a Civil Law, a Criminal Law, and a Public Law Division, which all encompass various subdivisions. Recent rulings can be accessed online,[598] although the dates from which this case law is available vary from one subdivision to the other.[599]

As of June 2019, the Supreme Court was staffed by 37 regular judges.[600] Judges in the canton of Geneva are elected by the people,[601] except for labor court judges, who are elected by the cantonal parliament.[602] Judges serve for a six-year term.[603]

4.1.2.2 *The High Court and the Administrative Court of the Canton of Zurich*

The High Court (Obergericht) is the highest court of the canton of Zurich in civil and criminal matters.[604] It is divided into two Civil Law and three

596 One example is the Supreme Court of the canton of Geneva, which is divided into various divisions ('cours') and chambers ('chambres'). When performing a keyword search, the search must be conducted separately for each subdivison. Another difficulty is that cantonal databases do not recognize the grammatical variations of a given keyword.

597 <swisslex.ch>.

598 <ge.ch/justice/dans-la-jurisprudence>.

599 Civil Law Court: Civil Law Chamber (since 2004), Labor Tribunal (since 1998), Tenancy Law Tribunal (since 2007), Chamber of Surveillance in Matters Pertaining to the Commercial Register and to the Land Register, to the Tribunal for the Protection of Children and Adults and to the Former Guardianship Court (since 2007), Chamber of Surveillance in Matters of Debt Collection and Bankruptcy (since 2004), Lawyers' Taxation Commission (since 2007). Criminal Court: Criminal Law Chamber (since 2007), Criminal Appeals Chamber (since 2011), Indictment Chamber (since 2007), Board of Appeals and Revisions (since 2011).

600 <ge.ch/justice/sites/default/files/justice/common/listes/magistrats/Magistrats_CJ.pdf>. Figures on the judiciary of the canton of Geneva are also available at <ge.ch/justice/magistrats>.

601 Art. 122(1) Cst-GE.

602 Art. 123(1) Cst-GE.

603 Art. 122(1) Cst-GE.

604 Art. 98(1)(b) and art. 99(1)(e) Cst-ZH.

Criminal Law Chambers. As of January 2019, the High Court counted 44 regular judges.[605]

The Administrative Court (Verwaltungsgericht) adjudicates disputes in public law matters.[606] It encompasses four specialized divisions. As of June 2019, it was staffed by 14 regular judges.[607] All judges are elected by the cantonal parliament and serve for a six-year term.[608]

4.1.2.3 *The Court of Appeals of the Canton of Basel-Stadt*

The Court of Appeals (Appellationsgericht) is the highest judicial body in the canton of Basel-Stadt in civil, criminal, administrative, and constitutional matters.[609]

As of June 2019, 8 presiding judges and 14 part-time judges were serving on the Court.[610] Presiding judges are elected by the people.[611] Part-time judges are chosen by the cantonal parliament.[612] Judges serve for a six-year term.[613]

4.1.2.4 *The High Court and the Administrative Court of the Canton of Bern*

The High Court (Obergericht) is the highest court in civil and criminal matters in the canton of Bern.[614] As of June 2019, it encompassed 22 regular judges.[615] Regular judges are elected by the cantonal parliament for a six-year term.[616]

The Administrative Court (Verwaltungsgericht) is the highest cantonal court in public law matters.[617] It is divided into three chambers, which deal with administrative law, social insurance law, and cases in French, respectively (the canton of Bern is bilingual). As of June 2019, 19 regular judges were serving on the Court.[618] All judges are elected by the cantonal parliament for a six-year term.[619]

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605 See the Court's annual report for 2018, available at <www.gerichte-zh.ch/fileadmin/user_upload/Dokumente/obergericht/Rechenschaftsberichte/Rechenschaftsbericht_2018.pdf>.

606 See Art. 1 of the Verwaltungsrechtspflegegesetz of the canton of Zurich of 24 May 1959.

607 <www.vgr.zh.ch/internet/verwaltungsgericht/de/ueber_uns/organisation.html>.

608 Art. 75(1) and 41(2) Cst-ZH.

609 Art. 117(1) Cst-BS.

610 <www.appellationsgericht.bs.ch/ueber-das-gericht/gerichtspraesidien.html> and <www.appellationsgericht.bs.ch/ueber-das-gericht/richterinnen.html>.

611 Art. 44(1)(d) Cst-BS.

612 Art. 89(1) Cst-BS.

613 Art. 73(2) Cst-BS.

614 Art. 98(1)(b) and art. 99(1)(e) Cst-BE.

615 <bit.ly/2W9YFfP>.

616 Art. 77(1)(d) and (e) Cst-BE.

617 Art. 100(1) Cst-BE.

618 <bit.ly/2I15O8t>.

619 Art. 77(d) and (e) Cst-BE.

4.1.3 Military Tribunals

Besides the decisions of federal and cantonal courts, it is important not to overlook the rulings of military tribunals, which adjudicate disputes pursuant to military law.

In Switzerland, which has a militia army primarily composed of conscripts and volunteers,[620] the Swiss Criminal Code does not apply to offences subject to military criminal law.[621] Offences that fall under the Swiss Military Criminal Code (SMCC) can be prosecuted regardless of where they have been committed.[622] Offences criminalized by the SMCC include violations of the neutrality of Switzerland,[623] other acts undermining military security, genocide, crimes against humanity, and war crimes.[624] Decisions of military tribunals are hence liable to provide insights into the interpretation of IHL, ICL, and IHRL.[625]

The Swiss military justice system includes eight military tribunals of first instance, three military courts of appeal and, at the top of the hierarchy, the Military Court of Cassation (MCC). In this book, I primarily consider the decisions of the MCC which have been published on the website of the Swiss authorities since 2006.[626] Exceptionally, I rely on the decisions of lower military tribunals.

Members of the military justice system must be officers in the army and, in principle, have graduated in law.[627] Judges serving on the lower military tribunals are appointed by the Federal Council for a four-year term.[628] Appointments to the MCC are made by the Federal Assembly for a four-year term.[629]

4.2 *Characteristics of Swiss Courts' Interpretative Activity*

In this subsection, my goal is to capture features of Swiss courts' interpretative activity that illuminate the legal context of courts' interpretation of

620 Art. 58(1) Cst.

621 Art. 9(1) SCrimC. Art. 3–8 S SMCC clarify which persons are subject to military criminal law.

622 Art. 10(1) SCrimC.

623 Art. 92 f SCrimC.

624 See Chapters 5, 6, and 6bis, respectively.

625 Eg MCC, *N. and Auditor v. Military Appeals Tribunal 1A*, judgment of 27 April 2001, DMC Vol 12 No 21; MCC, *Auditor v. Divisional Tribunal 1*, judgment of 5 September 1997, DMC Vol 12 No 4. Most relevant rulings are available at <www.icrc.org/applic/ihl/ihl-nat.nsf/vwLawsByCategorySelected.xsp?xp_countrySelected=CH>.

626 <ww.oa.admin.ch/de/entscheidungen-militaerjustiz.html>. I excluded the more comprehensive database (<eu.alma.exlibrisgroup.com/view/delivery/41BIG_INST/12329504630001791#main-carousel>) for reasons of scope.

627 Art. 2(1) Swiss Military Criminal Procedure Code of 23 March 1979 (SR 322.1).

628 Ibid, art. 7(1) and art. 11(1).

629 Ibid, art. 14(1).

international law. These features include courts' jurisdiction over international legal issues (4.2.1), the extent to which they defer to the other branches (4.2.2),[630] courts' duties as regards the interpretation of international law (4.2.3),[631] the procedure pertaining to judges' appointment (4.2.4) and to the drafting of their judgments (4.2.5), the Swiss Federal Tribunal's so-called 'pragmatic methodological pluralism' (4.2.6) and, finally, the legal authority of judicial law in the Swiss legal order (4.2.7).

4.2.1 Jurisdiction Over International Legal Issues

The jurisdiction of federal courts other than the Swiss Federal Tribunal has been examined in subsections 4.1.1.2 and 4.1.1.3 (*supra*). Cantonal laws do not exclude the jurisdiction of cantonal courts over international legal issues. The most detailed laws on Swiss courts' jurisdiction over international legal issues concern the Swiss Federal Tribunal.

While the Swiss Federal Tribunal has general jurisdiction over international legal issues (*supra*, 4.1.1.1), there are exceptions to this principle. Some issues that may trigger the application of international law are outside the Court's jurisdiction. The Swiss Constitution provides that acts of the Federal Council and of the Federal Assembly cannot in principle[632] be reviewed by the Swiss Federal Tribunal.[633] These acts, according to the Court, are 'essentially political decisions'.[634] A jurisdictional exclusion also applies to decisions in matters pertaining to foreign relations and is hence likely to involve questions of international law. The Federal Act on the Swiss Federal Tribunal further clarifies the scope of the Court's jurisdiction.[635]

630 See already Besson and Ammann (n 60) 40.

631 See also ibid 32.

632 See however BGE 125 II 417, at 4 b) (where the Court reviewed the compatibility of a confiscation order of the Federal Council with art. 6(1) ECHR).

633 Art. 189(4) FA-SFT.

634 BGE 134 V 443, at 3.1.

635 Art. 83 FA-SFT. Appeals in public law matters are inadmissible if they deal with specific foreign relations matters or international legal issues, including decisions affecting the State's external security, neutrality, diplomatic protection, and other issues pertaining to foreign relations, except where international law establishes a right that the issue be adjudicated by a court ((a); see also BGE 132 I 229, at 6.1). Decisions on international administrative assistance are also outside the Court's jurisdiction, with the exception of administrative assistance in fiscal matters ((h); see also art. 84a). Appeals against decisions pertaining to international assistance in criminal matters are admissible only in specific cases and if these cases are deemed 'particularly important', eg when the procedure conducted in a foreign State violates fundamental principles or displays serious flaws (art. 84).

Swiss courts have not developed an elaborate approach to their own jurisdiction, analogous to the political question doctrine[636] or the act of State doctrine[637] of US and UK courts.[638] These doctrines state the conditions under which courts can review the acts of other domestic authorities or other States. The Swiss Federal Tribunal considers that the notion of 'other matters pertaining to foreign affairs'[639] (which are outside its jurisdiction) must be interpreted narrowly. On the other hand, it has noted that the executive enjoys a wide margin of appreciation to defend the State's interests domestically and abroad, and that it has the sole responsibility for decisions taken in this area.[640]

Swiss courts have refused to review some claims by resorting to specific judicial strategies (or 'avoidance doctrines', as Eyal Benvenisti calls them).[641] One illustration which I have already mentioned concerns the determination of direct effect (*supra*, 2.2.3).[642] Another example pertains to the law of immunities. According to the Swiss case law, disputes involving a foreign State are justiciable only if they display a sufficiently tight nexus (a so-called 'Binnenbeziehung') to Switzerland.[643] The way courts justify their resort to such 'avoidance doctrines' must be scrutinized, as these doctrines might allow them to abdicate from their duty to apply the law.[644]

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636 In the United States, see *Baker v. Carr*, 369 U.S. 186 (1962) and, in foreign affairs, *Goldwater v. Carter*, 444 U.S. 996 (1979); *Zivotofsky v. Clinton*, 132 U.S. 1421 (2012). In the United Kingdom, see *R* (*Campaign for Nuclear Disarmament*) *v. Prime Minister and Other*s, (2002) EWHC 2777 (Admin), cited by Weill (n 61) 76, footnote 41.

637 In the United States, see *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). On the UK doctrine of non-justiciability, see *Buttes Gas & Oil v. Hammer* (*No 3*), (1982) AC 888 UKHL, 931.

638 (Regarding the political question doctrine) Bernhard Ehrenzeller, 'Politische Fragen vor Verwaltungsgerichten' (2016) 117 Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 3, 16. On these doctrines, see Weill (n 61) 70 ff.

639 Art. 83(a) FA-SFT.

640 BGE 137 I 371, at 1.2.

641 Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (n 183). On the 'avoiding role' of domestic courts applying IHL, see Weill (n 61) 69 ff. The ILA Study Group on Domestic Courts talks about 'blunting rules'. See ILA, '(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15) 10 ff.

642 Ehrenzeller (n 638) 17.

643 BGE 134 III 570, at 2.2.

644 See also Weill (n 61) 70.

4.2.2 Courts' Relationship With the Other Branches of Government

In principle, Swiss courts adjudicate international legal issues independently from the other branches.[645] Yet the Swiss Federal Tribunal frequently takes the back seat and defers to or cites the federal executive (*infra*, 4.2.2.1) and the federal legislature (*infra*, 4.2.2.2). It is worth noting at the outset that the fuzzy division of competences between the Federal Assembly and the Federal Council in foreign relations (*supra*, 2.1.2) creates uncertainty as to their respective powers to apply and interpret (and, hence, to contribute to the formation of) international law. This uncertainty affects the activity of Swiss courts, which often consult the practice of their own State on a given international legal issue (see Chapters 7 and 8, *infra*).

4.2.2.1 *The Federal Executive*

The Swiss Federal Tribunal frequently mentions the executive's position on international law and/or its relationship to domestic law. This especially applies to the Federal Department of Foreign Affairs (FDFA) and its Directorate of International Law (DIL).

The Court has particularly often invoked reports, statements, and other documents issued by the DIL on the relationship between domestic and international law.[646] Other topics on which the Swiss Federal Tribunal has cited the DIL include domestic treaty-making powers,[647] State succession,[648] State recognition,[649] immunities of officials of IOs,[650] and the service abroad of official documents.[651] Hence, the Court has mainly cited the Directorate on matters of

645 BGE 132 II 65, at 4.2.3. As the Swiss Federal Tribunal stated in *Frigerio* with regard to treaty interpretation, 'the practice of the political and administrative authorities does not bind the courts', even if this practice is 'not insignificant for the judge's own opinion-forming', BGE 94 I 669, at 5; see also BGE 105 Ib 286, at 1 b). The latter especially applies when the agreement is primarily applied by other authorities. In such cases, departures from their practice must be justified by 'compelling reasons', BGE 94 I 669, at 5. See also BGE 112 Ia 148, at 5 b). To emphasize judicial independence, the Court has also stressed that all Swiss authorities have the duty to apply and to respect international law within the limits of their competences, see BGE 117 Ib 367, at 2 e). Somewhat ironically, the Court has then cited the FDFA's report on the relationship between domestic and international law.

646 BGE 125 II 417, at 4 d); BGE 120 Ib 360, at 2 c); BGE 116 IV 262, at 3 b) cc); BGE 123 II 595, at 7 c) and c) hh); BGE 119 V 171, at 4 a).

647 BGE 120 Ib 360, at 2 b).

648 BGE 132 II 65, at 3.5.2; BGE 139 V 263, at 5.3 and 6.2; BGE 123 II 511, at 5 d).

649 BGE 130 II 217, at 5.3.

650 BGE 120 V 405, at 3 b).

651 BGE 136 V 295, at 5.1 and 5.2.

general international law, or with regard to the politically sensitive issue of foreign immunities. At times, the Court has requested the Directorate to provide information deemed relevant to the case.[652] In some instances, it is unclear whether the DIL's view has been solicited by the Court or one of the parties, or whether the DIL has submitted it *proprio motu*.[653] The Directorate actively intervened in several federal court cases on the immunities of States and IOs and their officials.[654] Empirical work is needed to assess the extent to which the DIL influences the Court in its decision-making, especially in high-profile cases. However, such an endeavor is complicated by the confidential character of judicial work, and by judges' (understandable) reluctance to state that the other branches influence them.

Many rulings of the Swiss Federal Tribunal refer to official documents or statements issued by the FDFA, eg in cases pertaining to the law of immunities,[655] the State's treaty-making power,[656] or human rights protection in foreign States.[657] The FDFA has been asked to provide information by the Swiss Federal Tribunal in some cases,[658] and the Court has sometimes used its statements to corroborate its own interpretations.[659] Although it generally emphasizes the separation of powers in foreign affairs, the Swiss Federal Tribunal frequently defers to the FDFA, eg in cases pertaining to privileges and immunities or targeted sanctions.[660] The Swiss Federal Tribunal also acknowledges

652 BGE 111 V 65, at D and 4 b).

653 BGE 136 III 575, at 4.3.1.

654 BGE 136 III 379, at B.b (intervening in favor of the BIS); BGE 134 III 177, at A. (intervening in favor of Russia).

655 BGE 108 III 107, at 3; BGE 115 V 11, at 3 a); BGE 134 III 122, at 5.2.

656 BGE 112 Ia 75, at 4 c).

657 BGE 133 IV 76, at 4.3 (although the Court emphasizes in this case that such reports, even if they must be taken seriously, do not exclude extradition *per se*, see at 4.4).

658 BGE 110 V 145, at D.

659 BGE 131 V 174, at 3.4.

660 The Court has considered that the FDFA's refusal to intervene with the BIS to protect the interests of corporations incorporated in Switzerland is an act that lies within the Department's discretionary power, see BGE 137 I 371, at 1.3.2. It has backed the FDFA in a case pertaining to decisions on targeted sanctions taken by the Department in the aftermath of the Arab Spring on the basis of the power of the executive branch to 'issue ordinances' 'when the interests of the country' are at stake (art. 184(3) Cst.), a notion that the Court interprets in a highly deferential way. See BGE 141 I 20, at 5.1.1 (regarding sanctions taken against Egyptian nationals close to Hosni Mubarak in the aftermath of the Arab spring); BGE 132 I 229, at 10.3 (regarding sanctions against former Congolese dictator Mobutu). The Court has upheld targeted sanctions taken in order to pursue prudential interests, such as the aim of 'preventing that the reputation of Switzerland be tarnished on the international plane' (BGE 132 I 229, at 10.2), and decisions of the FDFA with regard to the privileges and immunities of foreign State representatives (BGE 130 III

the powers of the Department over specific issues, for instance as regards visa requirements.[661] Exceptionally, however, the Court has explicitly disavowed the FDFA, for example regarding an extradition request[662] or immunities from execution.[663]

Many of the Swiss Federal Tribunal's rulings with respect to international law refer to the Federal Council. The Court mentions it when the Council acts within its competences with regard to international law (eg concerning State recognition[664] or foreign relations),[665] and when it issues interpretive declarations pertaining to specific treaties.[666] It also mentions the Council to identify the Swiss practice on specific international legal issues.[667] The Swiss Federal Tribunal frequently cites the dispatch written by the Federal Council prior to the ratification of a treaty by the Federal Assembly.[668] This can be problematic

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430). It has also backed the FDFA's handling of a dispute between the CERN and two co-contractors, rejecting the claim that the Department had failed to respond to the request of the co-contractors (and to intervene with the CERN on their behalf) 'within a reasonable time', as required by art. 6(1) ECHR (BGE 130 I 312, at 5.4.2.1).

661 BGE 139 I 37, at 3.2.2.

662 In a suit pertaining to an extradition request from Kazakhstan, the Court, contrary to the FDFA's and to the Federal Office of Justice's statements (BGE 124 II 132, at B.), concluded that the Kazakh authorities had not given sufficient guarantees for extradition to be granted.

663 In BGE 134 III 122, at 5.3.3, the Court rejected the FDFA's statement that immunities from execution can be forfeited only for assets assigned to activities *jure gestionis*.

664 BGE 139 V 263, at 3 (recognition of Kosovo); BGE 130 II 217, at 5.3 (absence of recognition of Taiwan).

665 BGE 141 II 436, at 4.4.1 (regarding the Swiss Federal Council's decision to adopt the OECD standard regarding automatic exchange of information); BGE 123 II 175, at 2 b) (regarding the collaboration of Switzerland with the *ad hoc* international criminal tribunals).

666 BGE 118 Ib 462, at 2 a) (on the European Convention on Extradition).

667 BGE 112 Ia 75, at 4 c) (on art. 46 VCLT); BGE 123 II 595, at 4 b) (on the principle of good faith in mutual legal assistance cases); BGE 130 III 430, at 3.4.2 (on the deprivation of diplomatic immunity); BGE 108 II 398, at 3 a) (on the incorporation theory endorsed by Switzerland to determine the nationality of corporations, despite the fact that the Swiss Federal Tribunal's case law slightly differs from this theory, at 3 b)).

668 BGE 141 II 233, at 4.3.1 (on the Aarhus Convention); BGE 97 I 359, at 6 b) (on a treaty concluded in 1858 between the Swiss Confederation and the Grand Duchy of Baden); BGE 81 II 366, at 1 (on the 1952 Swiss–German Settlement Agreement); BGE 110 Ib 191, at 2 (regarding the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards); BGE 136 II 241, at 14.2, BGE 133 V 367, at 9.1, and BGE 131 V 390, at 10.1 (on the Swiss–EU Agreement on the Free Movement of Persons); BGE 110 Ib 208, at 2 b) (on the Refugee Convention); BGE 104 Ia 448, at 7 c), and BGE 99 Ia 78, at 5 a) (on the European Convention on Mutual Assistance in Criminal Matters); BGE 102 II 128, at 3 (on the Hague Convention of 1956 on the Law Applicable to Maintenance Obligations in Respect of Children); BGE 103 Ia 293, at 7 b) (on the ECHR); BGE 108 Ib 525, at 3 (on the Swiss–US Extradition Treaty of 1900).

if this domestic document is used as a substitute for the (international) *travaux préparatoires* to the treaty (art. 32 VCLT). The Court has further deferred to the government on questions of treaty interpretation,[669] on the interpretation of domestic laws with a nexus to Swiss foreign relations,[670] and on issues pertaining to the law of immunities[671] and extradition.[672] It has backed the Federal Council in high-profile human rights cases[673] and issues pertaining to the privileges and immunities of IOs,[674] as well as in a case of diplomatic treason.[675] The Court has also cited the Federal Council on matters pertaining to the relationship between domestic and international law[676] and the definition of *jus cogens*.[677] Some rulings even mention the position of individual members of

669 BGE 132 II 65, at 2.3 (on the interpretation of treaties of establishment); BGE 141 II 233, at 4.3 (on the interpretation of the Aarhus Convention); BGE 110 Ib 82, at 4 b) bb) (on the European Convention on Mutual Assistance in Criminal Matters); BGE 123 I 19, at 4 (on the CERD); BGE 84 II 487, at 2 b) (on the Swiss–French Agreement of 1869 on Jurisdiction and the Enforcement of Judgments); BGE 105 Ib 37, at 4 c) (on treaties pertaining to the recognition and enforcement of foreign judgments); BGE 103 Ia 517, at 4 f) (on ILO Conventions No 100 and 111); BGE 111 V 201, at 3 (on ILO Convention No 128).

670 BGE 126 IV 236, at 4 c) (on art. 267(2) SCrimC, which criminalizes diplomatic treason); BGE 120 V 150, at 2 b) (on the domestic legal consequences of Switzerland's ratification of the ECHR); BGE 133 V 233, at 3.4 (on the social security status of Swiss UN officials); BGE 109 IV 51, at 2 (on the domestic implementation of the Single Convention of Narcotic Drugs of 1961).

671 BGE 106 Ia 142, at 2 a) (on the right of foreign States to challenge enforcement measures in Swiss courts); BGE 120 V 405, at 3 a), and BGE 110 V 145, at 2 a) (on the regime of privileges and immunities of the members of permanent representations to IOs).

672 BGE 99 IV 257, at 5 d).

673 BGE 125 II 417 (*PKK*-case); BGE 126 II 145 (on a liability suit pertaining to Switzerland's restrictive asylum policy during World War II; BGer, judgment 2A.784/2006 of 23 January 2008 (*Al-Dulimi*), and BGE 133 II 450 (*Nada*), two cases in which the Court backed the executive's implementation of UN targeted sanctions and for which Switzerland was subsequently found to have violated the ECHR by the ECtHR. See ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, App No 5809/08 (ECHR Reports 2016), 21 June 2016; ECtHR, *Nada v. Switzerland*, App No 10593/08 (ECHR Reports 2012), 12 September 2012.

674 BGE 130 I 312.

675 BGE 126 IV 236, at 9.

676 BGE 133 II 450, at 6.1 (on the issue of what international legal norms bind Switzerland); BGE 139 I 16, at 5.2.1 (on the relationship between international law and a subsequently enacted, contradictory contitutional provision); BGE 137 I 305, at 3.2 (on the CEDAW's status in the Swiss legal order; the issue of direct effect was left open by the Court); BGE 93 II 192, at 4 (on the supremacy of a Swiss–French Treaty on Jurisdiction and on the Enforcement of Civil Judgments over Swiss law); BGE 121 V 246, at 2 c) (on the lack of direct effect, in principle, of the provisions of the ICESCR).

677 BGE 133 II 450, at 7.3.

the Federal Council.[678] Others provide evidence of a close collaboration between the Swiss Federal Tribunal and the federal government.[679] On rare occasions, the Court explicitly disagrees with the government.[680] In other cases, the Swiss Federal Tribunal strives to show that it does not contradict the Federal Council's position.[681]

To conclude, even if the Swiss Federal Tribunal's deference towards the federal government in foreign affairs is nowhere near as pronounced as in some other States,[682] it generally markedly relies on the federal executive. While deference may be warranted when the Federal Council acts within its designated constitutional competences in foreign affairs, it is important to stress that courts must adjudicate disputes with independence and impartiality. This duty is reflected in Swiss law, but also (*qua* State duty) in international law.[683] Courts must not shy away from examining the (domestic and international) legality of foreign affairs.

4.2.2.2 *The Federal Legislature*

As already noted (*supra*, 2.2.2), art. 190 Cst. states that the Swiss Federal Tribunal must apply federal acts and international law.[684] One consequence is that federal acts are immune from judicial review, even when they are deemed incompatible with constitutional law or international law. Proposals to introduce constitutional review or to strengthen judicial review have been

678 BGE 123 II 595, at 4 d), where the Court reports the legislative history of the domestic statute at stake and mentions in detail the disagreements between the Federal Council and the legislature; BGE 133 II 97, at 2.2 (mentioning the position of Federal Councillor Christoph Blocher).

679 In *Nada*, for instance, the Federal Council and the Swiss Federal Tribunal conducted an exchange of views before the Federal Council transferred the complaint of Youssef Nada to the Court. See BGE 133 II 450 (facts).

680 One example pertains to an interpretative declaration of the Federal Council to the ECHR, which the Court deemed an invalid reservation, see BGE 118 Ia 473.

681 BGE 82 I 75, at 9 (on the law of immunities).

682 On a past French practice according to which the Conseil d'Etat deferred to the French Ministry of Foreign Affairs on matters of treaty interpretation, and which the ECtHR considered contrary to art. 6(1) ECHR, see ECtHR, *Beaumartin v. France*, App No 15287/89 (ECHR Reports Series A No 296-B), 24 November 1994, See also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), where the US Supreme Court famously held that the President was the 'sole organ of the nation in its external relations'. For an example of utter deference of domestic courts to the executive, see Congyan (n 44).

683 See art. 5(1) and (4) and art. 30(1) Cst., on the one hand, and art. 6 ECHR and art. 14 ICCPR, on the other hand.

684 Art. 190 Cst.

discussed many times,[685] but they have always been rejected by the federal parliament. In 2012, the federal government's proposal to abrogate art. 190 and to introduce a concrete review of federal acts[686] was once again rejected by the parliament.[687]

While the Swiss Federal Tribunal cannot invalidate federal acts deemed incompatible with international law, the Court can 'invite the legislature' to amend acts deemed problematic.[688] On its official website, the Court notes that 'controversial judgments can nourish the political debate and eventually lead the parliament to reformulate laws or to incorporate new topics'.[689] In several cases, the Swiss Federal Tribunal has indeed 'nudged' the federal legislature by pointing out that in case of prolonged legislative inaction, it might intervene in the future and enforce the supremacy of international law.[690]

The Court's involvement has been timid, however. One example pertains to reverse discrimination (ie, the discrimination of Swiss citizens compared to EU citizens), which the Swiss Federal Tribunal deems problematic from the perspective of art. 8 and 14 ECHR. In 2010, the Court indicated that it might eventually tackle the issue itself, should the legislature fail to design a remedy compatible with the Constitution and the ECHR 'in a predictable future'.[691] In 2015, however, the Court backed down and merely acknowledged the legislature's failure to address the problem, without taking any further steps.[692]

685 Federal Council, *Botschaft über eine neue Bundesverfassung*, 20 November 1996, FG 1997 I 1, at 505 ff; Federal Council, *Botschaft zur Neugestaltung des Finanzausgleichs und der Aufgaben zwischen Bund und Kantonen* (*NFA*), 14 November 2001, FG 2002 2291, at 2464 ff; Otto Zwygart, Parliamentary Initiative 99.455, Verfassungsgerichtsbarkeit, 10 October 1999; Heiner Studer, Parliamentary Initiative 05.445, Verfassungsgerichtsbarkeit, 6 October 2005; Vreni Müller-Hemmi, Parliamentary Initiative 07.476, Bundesverfassung massgebend für rechtsanwendende Behörden, 10 October 2007. See also the comprehensive article of Maya Hertig Randall, 'L'internationalisation de la juridiction constitutionnelle : défis et perspectives' (2010) 129 Zeitschrift für Schweizerisches Recht / Revue de droit suisse 221.

686 This proposal was made by the Federal Council namely in order to ensure a congruence between the powers of the Swiss Federal Tribunal and those of the ECtHR, which can assess the compatibility of federal acts with the ECHR; Federal Council, *Botschaft über eine neue Bundesverfassung*, 20 November 1996, FG 1997 I 1, at 508.

687 One of the arguments raised in parliament was that 'judicial decisions are ultimately not more rational than popular decisions', see Paul Rechsteiner, Council of States, Summer Session 2012, 7th session, 4 June 2012, 8.15 AM (regarding parliamentary initiatives 05.445 and 07.476).

688 BGE 136 I 65, at 3.2.

689 <www.bger.ch/index/federal/federal-inherit-template/federal-faq/federal-faq-5.htm>.

690 BGE 125 III 209, at 6 e).

691 BGE 136 II 120, at 3.5.3.

692 BGer, judgment 2C_1071/2014 of 28 May 2015, at 2.1.

4.2.3 The Duty to 'Apply' and 'Respect' International Law

The Constitution states that Swiss courts 'apply the federal acts and international law'[693] and that federal and cantonal authorities 'shall respect international law'.[694] However, Swiss courts have no domestic legal duty to consider international law, unlike the Supreme Court of South Africa, for instance.[695] They are free, under domestic law, to choose the means they consider appropriate to ensure that Switzerland respects its international obligations. Of course, from the perspective of international law, they may trigger their State's international responsibility, regardless of what domestic law provides.[696]

As previously noted (*supra*, 3.4), the constitutional popular initiative 'on self-determination' sought to amend art. 190 Cst. and to establish the supremacy of the Swiss Constitution over other laws, including the State's international obligations. The initiative was rejected by Swiss voters on 25 November 2018.

4.2.4 Judges' Election by the Parliament and Political Affiliation

Swiss judges are elected by the parliament and, for some of them, by the people. In most cases, they are appointed for a determinate period of time, with the consequence that judges must run for reelection. While this Swiss peculiarity attenuates the counter-majoritarian[697] traits of judicial decision-making by unelected judges, it also generates difficulties, as I will emphasize. Only a few cantons have mitigated the influence of political parties on judges,[698] eg Fribourg[699] and Ticino.[700]

693 Art. 190 Cst.

694 Art. 5(4) Cst. In all these cases, the term 'international law' refers to the sources of international law listed in art. 38 ICJ Statute, see Ehrenzeller, Schindler, and Schweizer (n 382) 3038.

695 Art. 39(1) of the Constitution of the Republic of South Africa of 16 December 1996: 'When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law'.

696 Art. 27 VCLT, art. 4(1) ARSIWA.

697 Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962) 16 ff.

698 Marco Borghi, 'La mainmise des partis politiques suisses sur l'élection des juges' (2016) Justiz – Justice – Giustizia para 3.

699 Judges are elected for an indeterminate period of time, see art. 121(2) Cst-FR.

700 Prior to the election of judges by the cantonal parliament, a committee of experts issues a recommendation as to the candidates' aptitude, see art. 36(2) Cst-TI.

The legislature[701] enjoys substantial leeway when electing federal judges, as the law does not prescribe specific criteria.[702] Linguistic representativeness is of great relevance to judges' election (on linguistic diversity, see *supra*, 3.2). The representation of the three official languages was constitutionally required until the revision of the Constitution in 1999,[703] and the Federal Act on the Swiss Federal Tribunal still mandates the federal legislature to take linguistic diversity into account when electing federal judges.[704] Another important (yet soft) criterion is political representativeness.[705] Because their (re)election is usually entrusted to the legislature, Swiss judges are, *de facto*, forced to join a political party,[706] to which they pay an annual fee of up to 5% of their yearly salary.[707] The politicization of Swiss judges has increased in recent years, with fewer judges being members of no political party. While in the 1920s, close to 30% of judges serving on the Swiss Federal Tribunal had no party affiliation, this percentage is now close to zero.[708]

The parliamentary (or even popular) election of Swiss judges is a peculiarity from a comparative law perspective.[709] It contrasts with other States where judges are appointed by the President, as is the case with judges of the French Cour de Cassation or Austrian Constitutional Court judges, for instance. It also differs from hybrid modes of selection, like in Italy, where constitutional judges are chosen in part by the parliament, in part by the President, and in part by

701 Federal judges are elected by the Federal Assembly based on a proposal of the Judicial Committee. See <www.parlament.ch/en/organe/committees/other-committees/committee-jc>.

702 Luc Gonin and Olivier Bigler, 'La sélection des juges fédéraux en Suisse, avec un aperçu cantonal de la situation dans le Canton de Genève' in Lukas Heckendorn Urscheler (ed), *Rapports suisses présentés au XIX^e Congrès international de droit comparé : Vienne, du 20 juillet au 26 juillet 2014* (Schulthess 2014) 17 f.

703 Art. 107(1) of the Swiss Constitution of 29 May 1874.

704 Art. 18(2) FA-SFT.

705 <www.bger.ch/index/federal/federal-inherit-template/federal-richter.htm>.

706 See the list at <www.bger.ch/index/federal/federal-inherit-template/federal-richter/federal-richter-bundesrichter.htm>. On the constitutional problems this 'forced affiliation' creates, see Borghi (n 698) para 38 ff; Nicolas Queloz, 'Compléments récents apportés au droit pénal suisse de la corruption et développements relatifs aux relations entre juges et partis politiques' (2006) Justiz – Justice – Giustizia para 20 ff.

707 Tiziano Balmelli, 'Quelques remarques sur l'exigence de réformer les procédures de désignation des juges : la controverse des contributions financières réclamées par les partis' (2006) Justiz – Justice – Giustizia.

708 Adrian Vatter, 'Die Parteifarben der obersten Richter im Wandel' *NZZ of 23 September 2013*.

709 Benjamin Suter, 'Appointment, Discipline and Removal of Judges: A Comparison Between Swiss and New Zealand Judiciaries' (2015) 46 Victoria University of Wellington Law Review 267; Borghi (n 698) 10.

the judiciary. Judges' reelection also distinguishes the Swiss judiciary from States where judges in the highest courts have life tenure,[710] or where reelection is impossible.[711]

Several Swiss judges have defended the Swiss system in their writings.[712] Yet as many scholars[713] and even some Swiss magistrates[714] highlight, this legislative (or popular) mode of selection and, hence, the partisan affiliation of most Swiss judges, the fee they pay their political party, and the fact that they need to run for reelection, all jeopardize courts' independence and impartiality. The importance of judicial independence is reflected in domestic constitutional law and international law. It is also stressed in soft law instruments,[715] including as regards the judicial interpretation of international law.[716] These features of the Swiss system have been criticized by the Group of States Against Corruption (GRECO), with little success so far.[717]

Of course, judges decide based on a (more or less consistent) set of beliefs regardless of any formal political affiliation. Moreover, Swiss judges' political affiliation has the merit of being transparent, and it is a way of ensuring that in making their decisions, they remain accountable to the legislature.[718] However, the absence of separate opinions in the Swiss judiciary (*infra*, 4.2.5) makes it almost impossible to identify when a judge departs from the party's line. In

710 Eg in the United States, Belgium, France, and the Netherlands.

711 Eg in Germany.

712 Hansjörg Seiler, 'Richter als Parteivertreter' (2006) Justiz – Justice – Giustizia; Peter Albrecht, 'Richter als (politische) Parteivertreter?' (2006) Justiz – Justice – Giustizia.

713 Borghi (n 698); Balmelli (n 707); Queloz (n 706).

714 Niccolò Raselli, 'Richterliche Unabhängigkeit' (2011) Justiz – Justice – Giustizia 6 f; Karl Spühler, 'Der Richter und die Politik' (1994) 130 Zeitschrift des Bernischen Juristenvereins 28.

715 European Charter on the Statute for Judges of 8–10 July 1998, at 2.1; UN Commission on Human Rights, *Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice, Impunity*, Annex: Bangalore Principles of Judicial Conduct, UN Doc E/CN.4/2003/65, 10 January 2003, Value 1.

716 Institut de droit international, 'The Activities of National Judges and the International Relations of Their State' (1993) <www.justitiaetpace.org/idiE/resolutionsE/1993_mil_01_en.PDF>.

717 GRECO, *Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors*, Evaluation Report, Switzerland, Fourth Evaluation Round, GrecoEval4Rep(2016)5, 2 December 2016, <rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680 6fceda> (para 95 ff and para 291); GRECO, *Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors*, Compliance Report, Switzerland, Fourth Evaluation Round, GrecoRc4(2019)2, 22 March 2019, <rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/168094e860> (para 49–63, para 107, and para 109).

718 Seiler (n 712) para 10 ff.

recent years, studies have sought to establish a correlation between judges' affiliation to a political party and the outcome of their decisions (a correlation which judges themselves deny for understandable reasons).[719] In October 2016, the Swiss newspaper *Tagesanzeiger* published the results of an empirical study of 29,263 asylum claims brought before the Federal Administrative Court. The study shows that left-wing judges are up to three times more likely to grant appeals than judges leaning towards the political right.[720]

The increasing number of popular initiatives aimed at limiting Swiss courts' interpretative freedom shows that judicial decision-making is under pressure.[721] Especially in the area of criminal law, several initiatives express a popular distrust of the judiciary, eg the 2010 vote on the 'expulsion of foreign criminals'[722] and its unsuccessful successor, the so-called 'enforcement initiative' of 2016.[723] Several popular votes have restricted judges' interpretative leeway in cases involving dangerous sexual or violent offenders.[724] Finally, the initiative on self-determination, rejected in 2018, sought to limit Swiss courts' interpretative freedom in the arbitration of conflicts between domestic and international law.[725]

Given Swiss judges' mode of selection, it is interesting to take a look at the composition of the Swiss Federal Tribunal. A judge serving on the Swiss Federal Tribunal is typically German-speaking, male, white, and leans towards the right. As of June 2019, out of 38 judges serving on the Swiss Federal Tribunal, 3 spoke Italian as their main language, 12 French, and 23 German.[726] At the same date, 14 out of the 38 federal judges in office were women.[727] As of June 2019, 222 out of the 228 former federal judges were men (the first female federal judge, Margrith Bigler-Eggenberger, was elected in 1972 and became a regular federal judge in 1974), and none of the 97 former presidents of the Swiss Federal Tribunal were female.[728] The

719 Borghi (n 698) para 23. See for instance Albrecht (n 712).
720 Rau and Skinner (n 285).
721 FG 2015 7099, at 7102.
722 <www.admin.ch/ch/d/pore/vi/vis357.html>.
723 <www.admin.ch/ch/d/pore/vi/vis433t.html>.
724 Art. 123a, 123b, and 123c Cst., adopted by popular votes in 2004, 2008, and 2014, respectively.
725 <www.admin.ch/ch/d/pore/vi/vis460t.html>.
726 <www.bger.ch/index/federal/federal-inherit-template/federal-richter.htm>.
727 Ibid.
728 <www.bger.ch/index/federal/federal-inherit-template/federal-status/federal-richter-altebundesrichter.htm>.

Swiss Federal Tribunal counts few (if any) members of racial or religious minorities.[729]

As of June 2019, the Court counted 9 members of the Socialist Party and 4 members of the Green Party. Thus, one third of the Court (13 out of 38 judges) leaned towards the left. Twenty-five judges were at the center or on the political right: 6 judges were affiliated to the Christian Democratic Party (CVP), 10 to the Swiss People's Party (SVP), 7 to the Free Democratic Party (FDP)/Liberals, 1 to the Conservative Democratic Party (BDP), and 1 to the Green Liberal Party.[730]

4.2.5 The Absence of Separate Opinions

Another idiosyncratic feature of the Swiss judiciary (especially compared to common law jurisdictions) is that judgments do not in principle include separate opinions, ie, dissents or concurrences. Thus, Swiss courts' decision-making is more of a black box than that of courts in many other States[731] and of some international courts.[732] Contrary to what applies to other jurisdictions,[733] it is difficult to determine how individual Swiss judges position themselves with regard to particular domestic or international interpretative issues, and how their political affiliation (*supra*, 4.2.4) affects their decisions. Whenever courts do not deliberate publicly (and they rarely do), one can only analyze the final decision, ie, the aggregation of the preferences of the judges involved in a given case.[734]

729 Bigler and Gonin only mention religious diversity as regards Catholics and Protestants. See Gonin and Bigler (n 702) 18. Vera Rottenberg Liatowitsch, elected in 1994, was the first Jewish judge to serve on the Swiss Federal Tribunal.

730 At the time of writing, it was still unclear whether a retiring SVP judge of the Swiss Federal Tribunal's second public law chamber would be replaced by a judge of the same party or, instead, by a CVP judge. The Judicial Committee recommended electing the latter, supposedly to avoid a dominance of the SVP (3 instead of 2 judges out of 6) in the chamber that addresses conflicts between international law and domestic law. See Fabian Schäfer, 'Angst vor der SVP: Hintergrund der umstrittenen Richterwahl sind die Konflikte zwischen Landes – und Völkerrecht' *NZZ of 15 June 2019*.

731 In common law jurisdictions, courts usually publish concurrences and dissents and disclose the positions of individual judges.

732 Most international courts allow for dissents and concurrences. The CJEU is an exception in this regard.

733 In the United States: David M O'Brien, 'More Smoke Than Fire: the Rehnquist Court's Use of Comparative Judicial Opinions in the Construction of Constitutional Rights' (2006) 22 Journal of Law and Politics 83; Ryan C Black and others, 'Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court's Use of Transnational Law to Interpret Domestic Doctrine' (2014) 103 Georgetown Law Journal 1.

734 This method is used by Rau and Skinner (n 285).

The Swiss Federal Tribunal for example takes its decisions by majority vote.[735] Its rulings only reflect the opinion of the majority, and they do not disclose the breakdown of the votes.[736] A proposal to introduce dissenting opinions in the Swiss Federal Tribunal was rejected by the Swiss parliament in 1997.[737] In 2014, both chambers of the parliament agreed to task the Federal Council with preparing a draft version of the Federal Act on the Swiss Federal Tribunal so that rulings can reflect dissenting opinions.[738] At the time this book was being finalized (June 2019), the government's proposal[739] had not yet been discussed by the two chambers of the federal parliament. The Swiss Federal Tribunal is opposed to the aforementioned legislative amendment.[740] When considering whether a legislative amendment is necessary, it is worth noting that it is increasingly rare for the Swiss Federal Tribunal's deliberations to be public. In 2012, for instance, only 0.8% of all deliberations were.[741] In 2018, a public deliberation was held in 48 out of 8,040 cases (ie, in 0.6% of all cases).[742] In light of this development, but also due to other reasons, calls for introducing dissenting opinions have become more vocal of late.[743] At the

735 Art. 21 FA-SFT.

736 Art. 122 FA-SFT.

737 Margrith von Felten, Motion 97.3368, Dissenting opinion in Bundesgerichtsentscheiden, 20 June 1997, <www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft? AffairId=19973368>.

738 National Council, Legal Affairs Committee, Motion 14.3667, Bundesgericht: Dissenting Opinions, 14 August 2014, <www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20143667>.

739 Art. 60(1^{bis}) FA-SFT. See FG 2018 4663, at 4664.

740 'Geschäftsbericht des Bundesgerichts 2014' (2015) 11 <www.bger.ch/d/gb_2014_d_bger.pdf>.

741 Michael Baum, 'Minderheitsvoten nur selten publiziert' (2013) 5 plädoyer 64.

742 <www.bger.ch/files/live/sites/bger/files/pdf/Publikationen/GB/BGer/de/BGer-BGerGB18_d.pdf>.

743 Arnold Marti, 'Offenlegen von Minderheitsmeinungen ("dissenting opinion"): Eine Forderung von Transparenz und Fairness im gerichtlichen Verfahren' (2012) Justiz – Justice – Giustizia; Patricia Egli, 'Dissenting Opinions: Abweichende Richtermeinungen im Schweizer Recht' in Franco Lorandi and Daniel Staehelin (eds), *Innovatives Recht: Festschrift für Ivo Schwander* (Dike 2011); Andreas Glaser and Arthur Brunner, 'Politik in der Defensive: Zwischen Vorrang des FZA und dynamischer Rezeption der EuGH-Rechtsprechung' Jusletter of 18 April 2016 19 f. On this trend, see Mirjam Baldegger, 'Der wiederkehrende Ruf nach dissenting opinions am Bundesgericht: Wünschbarkeit, Auswirkungen und Ausgestaltung richterlicher Sondervoten in der Schweiz' (2017) 118 Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 131. For a recent proposal to introduce separate opinions in Swiss courts in public law cases, see Luc Gonin, 'L'opinion dissidente en droit public suisse : une nécessité pratique et théorique' (2017) 136 Zeitschrift für Schweizerisches Recht / Revue de droit suisse 63. For a more cautious view, see Helen Keller and Laura Zimmermann, 'Dissenting Opinions

cantonal level, only a handful of cantonal judiciaries (Aargau, Geneva, Schaffhausen, Vaud, and Zurich) provide for separate opinions;[744] this option is rarely used in practice, however. When it is, separate opinions usually take the form of concise dissents.[745]

The fact that disagreements among Swiss judges are not reflected in their opinions (at least as far as federal courts and most cantonal courts are concerned) obscures the truth. Even a judgment adopted unanimously is not monolithic. The 'tyranny of the majority' and the flaws of decisions by majority vote, which are typically criticized in the context of democratic (legislative or popular) decision-making, are equally problematic in the context of judicial decision-making.[746] Publishing separate opinions can bring to light the conflicting considerations involved in the decisions. It provides helpful information for future cases and strengthens judicial accountability. Together with other factors, the absence of dissents and concurrences also explains the style of Swiss judicial opinions. They are, indeed, impersonal and relatively short, compared to those of English or American courts, for instance.[747]

On the other hand, it is worth noting that by law, pleadings (when applicable), as well as judges' oral deliberations and votes whenever a public deliberation is held, must be public.[748] This publicity creates difficulties too. It may put additional pressure on judges, especially in politically sensitive cases like those pertaining to the relationship between international law and constitutional

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am Bundesgericht: Individuelle Transparenz oder Gefährdung der richterlichen Unabhängigkeit?' (2019) 138 Zeitschrift für Schweizerisches Recht / Revue de droit suisse 137.

744 Ehrenzeller (n 638) 19 f; Marti (n 743); Gonin (n 743) 65 f.

745 There are exceptions, as Michael Baum points out, *inter alia* with reference to decision HG110192-O of the Commercial Court (Handelsgericht) of the canton of Zurich of 30 March 2012 (where a 21-page minority opinion is appended to the 8-page-long majority opinion), see Baum (n 741).

746 On this point, see Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346.

747 Similar to what Gráinne de Búrca notes regarding the CJEU, it could be said about the Swiss Federal Tribunal that 'the collegiate nature of the judgments and the formalistic style of judicial reasoning is very different from the richly textured, individualized and often colorful opinions of the [US] Supreme Court justices'. Gráinne De Búrca, 'International Law Before the Courts: the EU and the US Compared' (2015) 55 Virginia Journal of International Law 685, 693. For such a colorful example, see Justice Scalia's dissent in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

748 Art. 59(1) FA-SFT.

law. This pressure could increase in the future, given recent trends towards a greater transparency of judicial proceedings.[749]

4.2.6 'Pragmatic Methodological Pluralism'

One trademark of the Swiss Federal Tribunal is its 'pragmatic methodological pluralism', as the Court describes its approach to interpretation (see also *supra*, Chapter 1, section 3).[750] The Court articulated this conception of judicial interpretation in the 1980s,[751] but used it implicitly in earlier rulings.[752] It relies on it to interpret domestic statutory law, but also other domestic legal acts, as well as international law.[753] Pragmatic methodological pluralism is regularly mentioned by other federal[754] and cantonal[755] courts, including in the context of international law.[756] However, the specific implications of the Court's eclectic method for the interpretation of international law have been neglected in Swiss scholarship.[757] In the following paragraphs, I unpack the notions of

749 In 2014, the National Council rejected the proposal of parliamentarian Martin Schmid to livestream proceedings before the Swiss Federal Tribunal (<www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20133660>). Nonetheless, in April 2016, the Swiss Federal Tribunal started uploading videos of selected public proceedings, see <www.bger.ch/index/press/press-inherit-template/press-mediaplatform/federal-mediaplatform-all-meetings.htm>. As of June 2019, nine videos had been uploaded. The videos only cover the Court's final judgment. It remains to be seen how the Court's practice will evolve in this regard.

750 Eg BGE 140 II 495, at 2.3.3.

751 BGE 110 Ib 1, at 2 c) cc); BGE 114 V 219, at 3 a).

752 See BGE 83 I 173, at 4, a decision of 1957 stating that the Court does not exclude any method and 'resorts to the interpretative processes that seem the most proper, in the particular case, to bring out the true meaning of the norm'. See also BGE 59 II 264, at 6: 'Es geht nun nicht an, mit der Beklagten aus formellen Gründen eine "restriktive" Auslegungsmethode zu wählen, die der Sache nicht gerecht wird, sondern es muss der Bestimmung der Sinn beigelegt werden, der mit dem gekennzeichneten Ziel der Gemeinwesen am besten harmoniert (...)'. The Court transposed this method of statutory interpretation to the Constitution in the 1940s: Johannes Reich, *Grundsatz der Wirtschaftsfreiheit: Evolution und Dogmatik von Art. 94 Abs. 1 und 4 der Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999* (Dike 2011) 33.

753 Besson and Ammann (n 97).

754 SFAC, judgment A-5836/2015 of 26 May 2016, at 7.1.1.

755 VwGer-ZH, 4th chamber, decision VB.2014.00351 of 21 January 2015, at 3.2.2.1.

756 SFAC, judgment C-7063/2008 of 15 May 2009, at 3.3.1.1.

757 Virtually all authors focus on pragmatic methodological pluralism in the context of domestic law. See, among many others, Marc Amstutz, 'Ouroboros: Nachbemerkungen zum pragmatischen Methodenpluralismus' in Peter Gauch, Franz Werro, and Pascal Pichonnaz (eds), *Mélanges en l'honneur de Pierre Tercier* (Schulthess 2008); Pichonnaz and Vogenauer (n 105); Keshelava (n 105).

'methodological pluralism' and 'pragmatism', before highlighting the advantages and drawbacks of pragmatic methodological pluralism. I address the implications of this approach for international law in Part 3 (Chapters 5 and following, *infra*).

By endorsing 'methodological pluralism', the Swiss Federal Tribunal refuses to accept any hierarchy among different interpretative methods.[758] In the case of written law, the Court acknowledges that textual interpretation is the starting point of interpretation, and that the text should not be departed from lightly.[759] (On the centrality of textual interpretation, see *infra*, Chapter 6, 2.1.1.) The four main methods the Court refers to are the literal, systematic, teleological, and historical method.[760] Except for teleological interpretation, which Friedrich Karl von Savigny considered to be applicable in exceptional cases,[761] these methods go back to Savigny's 'four elements' doctrine,[762] later taken up, in a slightly adjusted form, by the Swiss jurist Arthur Meier-Hayoz in his commentary of art. 1 of the Swiss Civil Code.[763] The four methods are part of the first-year curriculum in Swiss law faculties, and they are mentioned in most Swiss doctrinal analyses of legal reasoning and interpretation.[764] As I will show (Chapters 5 and 6, *infra*), these four methods are used in other States as well, even if the terminology is inconsistent,[765] and even if not all States draw upon Savigny.

The Swiss Federal Tribunal uses 'pragmatism' as a synonym for both result-oriented and anti-theoretical decision-making. This conception of 'pragmatism' must hence be distinguished from other (especially philosophical)[766]

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758 BGE 125 II 238, at 5 a); BGE 134 II 308, at 5.2; BGE 139 II 49, at 5.3.1; BGE 140 V 227, at 3.2.

759 BGE 140 II 495, 2.3.1–2.3.3.

760 BGE 141 III 155, at 4.2.

761 Friedrich Karl von Savigny, *System des heutigen römischen Rechts* (Bei Veit und Comp 1840) 220.

762 See ibid 212 ff. Eg Reich (n 752) 19 ff. Savigny's elements also included 'logical interpretation', which today is usually associated with systematic interpretation: von Savigny (n 761) 214.

763 Reich (n 752) 22.

764 Conformity with international law has sometimes been mentioned as the fifth method, eg BGE 131 II 13, at 8.1. Peter Kunz considers that the four methods should not be supplemented by a fifth, 'comparative law' method: Peter V Kunz, 'Umgang mit internationalem und mit europäischem Recht. Überblick über den "Swiss Approach"' (2012) 23 LeGes 265, 270 f.

765 Systematic interpretation for instance seems to match what Bradley and Goldsmith refer to as 'structuralism'. See Bradley and Goldsmith (n 171) 41 f.

766 On the philosophy of pragmatism, see Hookway (n 117).

usages of the term. Pragmatism, according to the Court, requires determining which interpretive argument(s) ought to be decisive to ascertain the 'true meaning of the provision',[767] based on the circumstances of the case.[768] The Swiss Federal Tribunal has offered various definitions of pragmatic methodological pluralism. Some of them emphasize that the starting point must remain the wording of the provision,[769] or that the legal act must be interpreted primarily 'out of itself', ie, pursuant to the four aforementioned methods.[770] Another variation states that the literal meaning can be the basis of the interpretative result only if it yields a 'just substantive outcome'.[771] Yet other rulings highlight the need for a 'satisfactory result of the *ratio legis*',[772] and the importance of avoiding subjective value judgments.[773] These formulations reveal the evaluative nature of the interpretative process.

This result-oriented approach, and the reluctance to endorse 'grand theories' of judicial decision-making, are rooted in the Swiss polity and its idiosyncrasies. Democratic decision-making (*supra*, 3.4) and the governmental principle of collegiality require finding solutions that can be accepted *inter alia* because they are 'workable'.[774] This is not specific to Switzerland, however. In Norway, for instance, courts invoke so-called 'reelle hensyn' ('real considerations'),[775] through which they openly take policy considerations into account. The importance and ineluctability of such considerations, and lawyers' reluctance to believe in a 'heaven of legal concepts',[776] have also been emphasized by US judges and legal theorists.[777] In English administrative law, scholars have

767 BGE 140 II 495, at 2.3.3: 'Ist der Text unklar bzw. nicht restlos klar und bleiben verschiedene Interpretationen möglich, muss nach der wahren Tragweite der Bestimmung gesucht werden.'

768 BGE 138 I 274, at 1.2. As the Court often states, the norm is not reducible to its wording and must be 'understood and specified with regard to the facts of the particular case'. See BGE 141 III 155, at 4.2.

769 Ie, literal interpretation does enjoy priority unless the wording is not 'absolutely clear', see BGE 131 II 13, at 7.1; BGE 135 V 215, at 7.1; BGE 135 V 249, at 4.1; BGE 139 II 49, at 5.3.1; BGE 139 III 135, at 4.1; BGE 140 II 495, at 2.3.3; BGE 141 III 444, at 2.1.

770 BGE 140 I 305, at 6.1.

771 BGE 139 IV 270, at 2.2; BGE 140 IV 118, at 3.3.

772 BGE 140 I 305, at 6.1.

773 BGE 123 II 595, at 4 a); BGE 140 I 305, at 6.2.

774 Art. 177(1) Cst.

775 Tor-Inge Harbo, 'The European Economic Area Agreement: A Case of Legal Pluralism' (2009) 78 Nordic Journal of International Law 201, 209 f.

776 Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia Law Review 809.

777 Holmes (n 22). See also *Lochner v. New York*, 198 U.S. 45 (1902), and John Dewey, 'Logical Method and Law' (1924) 33 Philosophical Review 560. US judges such as Richard

argued that questions of fact must be distinguished from questions of law based on a 'pragmatic' approach, which they oppose to an 'analytical' one.[778] An analytical approach, as Timothy Endicott defines it, is 'an attempt to understand', to flesh out the reasons leading to the judicial decision.[779] Pragmatists dispense with such an analysis. A given interpretation is chosen because it is useful, because it 'will achieve the right outcome'.[780] Of course, said Norwegian and US doctrines are peculiar to their respective legal, political, and cultural context. Their emphasis on policy considerations starkly differs from the language that characterizes Swiss judicial reasoning.[781] Still, Swiss courts' 'pragmatism' is arguably not an isolated phenomenon.

Both pluralism and pragmatism can be a virtue, in the sense that judges are not straight-jacketed by a specific interpretative philosophy and pay attention to the characteristics of each case. This is in line with judges' duty to abide by the law and to be independent and impartial. One could argue that judges may make good decisions without adopting an analytical approach in the aforementioned sense, and by sticking to a pragmatic one.[782] One could also claim that pragmatic methodological pluralism is mandated by international law. Indeed, the methods of treaty interpretation, according to the ILC and to the drafters of the VCLT, must be 'thrown into the crucible, and their interaction [will] give the legally relevant interpretation'.[783]

On the other hand, pluralism and especially pragmatism can also be a vice. They create the risk that interpretative arguments are invoked and relied upon opportunistically, depending on the outcome judges seek to achieve, while

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Posner have defended a 'pragmatic' view of adjudication: Richard A Posner, 'Pragmatic Adjudication' (1996) 18 Cardozo Law Review 1. The approach of the US Supreme Court to constitutional interpretation has been described as 'pragmatic', see Mark Tushnet, 'Eclecticism in the Service of Pragmatism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2006). Emmanuelle Jouannet opposes the 'rationalism' of French lawyers to the fact that 'culturally, Americans do not like grand, formal, pre-determined structures and distrust the excessive use of legal categories'. See Emmanuelle Jouannet, 'Les visions française et américaine du droit international : cultures juridiques et droit international' in SFDI (ed), *Droit international et diversité des cultures juridiques* (Pedone 2008) 305.

778 On this issue, see Timothy Endicott, 'Questions of Law' (1998) 114 Law Quarterly Review 292.

779 See ibid 308 f.

780 See ibid 315. See also Walter (n 118).

781 BGE 98 Ib 385, at 2 a); BGer, judgment 4A_214/2013 of 5 August 2013, at 5.2.2.

782 This argument is mentioned by Endicott (n 778) 309.

783 ILC, 'Draft Articles on the Law of Treaties With Commentaries' (1966) II Yearbook of the International Law Commission 220.

contrary arguments are ignored. The anti-theoretical flavor of pragmatism may also legitimize a lack of judicial candor, and it dispenses judges from giving articulate reasons for their decisions. As a matter of fact, Swiss judges tend to cite the arguments that support the interpretative result reached by the ruling and, therefore, to consider only one part of the argumentative picture. Pragmatic methodological pluralism can encourage a form of lawlessness, thereby undermining judges' duty to obey the law. Moreover, as I will argue in more detail, pragmatic methodological pluralism may be unsuited to the interpretation of international law if it disregards the characteristics of it sources and its interpretative methods (Chapters 5 and following).

References to pragmatism often appear in the practice of other Swiss authorities as well. Pragmatism is frequently invoked in the context of Swiss foreign relations.[784] Moreover, the consensual nature of Swiss politics[785] requires finding workable solutions. Finally, 'pragmatism' also influences Swiss scholarship (*supra*, Chapter 1, 2.5), which rarely overtly criticizes the Swiss Federal Tribunal's interpretative approach. In the United States, judges and scholars often endorse a distinctive interpretative philosophy,[786] and they have offered elaborate theoretical accounts of legal and judicial interpretation.[787] Swiss judges and scholars, by contrast, do not usually advocate the superiority of one interpretative method, nor do they seek to theorize their interpretative approach.[788] Swiss constitutional legal scholars describe their field as 'skeptical towards overly abstract concepts',[789] but they barely dwell on the reasons for this skepticism. Few scholars depart from this path to analyze the Court's interpretative methods.[790] The handful of authors who have more openly criticized the Swiss Federal Tribunal's 'pragmatic methodological pluralism' have called it a 'method without method',[791] a 'principled unprincipledness',[792] a

784 FDFA, *Swiss Foreign Policy Strategy 2016–19* (n 300).

785 The Federal Council for instance is composed of seven ministers belonging to different representative political parties.

786 Examples include originalism, living constitutionalism, or political process theory.

787 See for instance Richard Fallon, 'A Constructivist Coherence Account of Constitutional Interpretation' (1987) 100 Harvard Law Review 1189.

788 Walter (n 118).

789 Ehrenzeller, Schindler, and Schweizer (n 382) 106.

790 For innovative approaches, however, see Amstutz (n 757); Marc Amstutz, 'Der Text des Gesetzes: Genealogie und Evolution von Art. 1 ZGB' (2007) 126 Zeitschrift für Schweizerisches Recht / Revue de droit suisse 237; Amstutz and Niggli (n 105); Papaux (n 105); Keshelava (n 105).

791 Pichonnaz and Vogenauer (n 105).

792 Arthur Meier-Hayoz, *Schweizerisches Zivilgesetzbuch, Einleitung, Art. 1–10 ZGB* (Stämpfli 1966) 138 f.

'tactical eclecticism',[793] 'a self-service store',[794] and 'cherry-picking without a clear concept'[795].[796] They have shown that pragmatic methodological pluralism hardly constrains the Swiss Federal Tribunal, which is the sole arbiter of the results yielded by different methods[797] (see *infra*, Chapter 5, 3.3). They have also demonstrated that the Court, which must imperatively reach a decision and, in this sense, be result-oriented ('pragmatic'), is often primarily guided by teleology.[798]

4.2.7 The Legal Authority of Domestic Rulings in the Swiss Legal Order

Lastly, we must clarify the legal authority that court rulings enjoy in the Swiss legal order, ie, the extent to which Swiss judicial decisions are a source of domestic law[799] (on their legal effect in international law, see *infra*, Chapter 4, section 3). When we talk about judicial lawmaking, what is at stake is not only courts' decisional authority, ie, their authority to settle a particular case, but also their (potential) interpretive authority, ie, their legal authority in a given legal order beyond this particular dispute (eg in the context of future interpretations of the law).[800]

Art. 1 of the Swiss Civil Code, which applies to the Swiss legal order, is particularly interesting (though ambiguous) in this regard. It provides that the court, in the absence of an applicable legal provision, must decide based on customary law 'and, in the absence [thereof], in accordance with the rule that it would make as a legislator'.[801] The position Swiss courts and lawyers adopt towards judges' interpretive authority is influenced by the commitment of the Swiss

793 Yann Grandjean borrows this expression from French scholar Jean Carbonnier. See Grandjean (n 175) 370.

794 Kramer (n 105) 179.

795 Kunz, 'Umgang mit internationalem und mit europäischem Recht. Überblick über den "Swiss Approach"' (n 764) 270.

796 See also Besson and Ammann (n 97) 339.

797 Grandjean (n 175) 370.

798 Pichonnaz and Vogenauer (n 105) 424 f; Grandjean (n 175) 370; Besson and Ammann (n 97) 340 ff.

799 On this issue, see Riccardo Guastini, 'Les juges créent-ils du droit ? Les idées de Alf Ross' (2014) 24 Revus 99; Jan Komárek, 'Judicial Lawmaking and Precedent in Supreme Courts' (2011) 4 <eprints.lse.ac.uk/38468/1/WPS2011-04_Komarek.pdf>; Michel van de Kerchove, 'La jurisprudence revisitée : un retour aux sources' in Isabelle Hachez and others (eds), *Les sources du droit revisitées – Vol 2 : Normes internes infraconstitutionnelles* (Anthémis/Publications des Facultés universitaires Saint-Louis 2012).

800 On this distinction, see Besson, 'The Erga Omnes Effect of Judgments of the European Court of Human Rights – What's in a Name?' (n 137).

801 Art. 1(2) SCC.

polity to the rule of law and legislative supremacy (*supra*, 3.3 and 3.5). They typically consider that the law is the basis and limit of Swiss judges' activity, and that judges must apply, not make law.[802] In short, they do not deem judicial rulings a source of domestic law. Although the Swiss Federal Tribunal does not see itself as a 'juridical machine' or a 'subsumption automaton',[803] it often uses mechanistic, non-evaluative language and emphasizes the syllogism that characterizes deduction[804] without mentioning its creative effect. Swiss scholars have defined the judge as a 'person whose syllogistic reasoning produces legal effects'.[805]

Still, art. 1(2) of the Swiss Civil Code shows that judicial lawmaking is not unfamiliar to the Swiss legal order. In cases pertaining to domestic law, the Swiss Federal Tribunal has acknowledged the need for judges to interpret the law 'in light of [its] general development and of contemporary circumstances' when legislative intent is indeterminate.[806] It has also used the notions of lawmaking, law development, adjustment, and gap-filling when describing the task of judges.[807]

The conditions under which the Court engages in dynamic interpretation are narrow.[808] Nonetheless, the Court has assumed a lawmaking role in some areas of domestic law, including in constitutional law. In a way that, *mutatis mutandis*, reminds us of the US Supreme Court's unenumerated rights adjudication,[809] the Swiss Federal Tribunal has identified several unwritten

802 Karl-Ludwig Kunz, 'Politisches Engagement und die Unbefangenheit des Richters' in Marianne Heer, Marcel Alexander Niggli, and Marc Thommen (eds), *Toujours agité – jamais abattu: Festschrift für Hans Wiprächtiger* (Helbing & Lichtenhahn 2011).

803 Hans Peter Walter, 'Der Methodenpluralismus des Bundesgerichts bei der Gesetzesauslegung' (1999) 17 recht 157, 157. See however Ehrenzeller, Schindler, and Schweizer (n 382) 3049.

804 BGE 98 Ib 385, at 2 a).

805 Grandjean (n 175) 366.

806 BGE 86 IV 92, at b).

807 BGE 137 V 167, at 3.2; BGE 137 V 126, at 4.1; BGE 137 V 90, at 5.2; BGE 128 V 108, at 4 b); BGE 128 V 199, at 5 b). See also BGE 124 V 301, at 5. In a decision of 2012, the Swiss Federal Tribunal has stated that besides the protection of individuals, the task of the judiciary (at least as regards the highest court) is the uniform application of the law, as well as law development. See BGE 138 V 271, at 3.3. It has also noted that 'pursuant to contemporary conceptions, to apply a *prima facie* clear legal norm by analogy to a particular situation at which the norm is not aimed is an act of judicial lawmaking, and not an inadmissible interference with legislative power', see BGE 127 V 484, at 3 b) bb).

808 Thus, in a decision pertaining to guardianship rights, the Swiss Federal Tribunal dismissed scholarly criticism according to which the Court had ignored new legal developments, stating that it was a 'law-applying' authority which could only exceptionally depart from the law (BGE 123 III 445, at 2 b)). See also BGE 124 V 159, at 4 c).

809 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

fundamental rights[810] based on existing provisions of the Federal Constitution[811] and of cantonal constitutions. This case law was subsequently codified in the 1999 revision of the Federal Constitution.[812] Judges themselves note in their writings that interpretation involves evaluation,[813] and Swiss scholarship increasingly emphasizes the creative dimensions of judicial reasoning.[814]

The orthodox doctrine based on which courts must remain independent from the political branches and especially from the legislature sits uneasily with judges' power to make law in individual cases, and even to influence the formation and development of domestic[815] law. Yet all three branches of government have lawmaking powers, even if they must exercise them separately in their respective domains of activity, without interfering with one another. Swiss courts make law in individual cases. In doing so, they also influence future interpretations of the law.

5 Conclusion

The Swiss legal order is characterized by a range of specificities that affect and constrain Swiss courts' activity, including when they apply international law.

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810 Gonin and Bigler (n 702) 22 ff; Andreas Kley, 'Der Grundrechtskatalog der nachgeführten Bundesverfassung: Ausgewählte Neuerungen' (1999) 135 Zeitschrift des Bernischen Juristenvereins 301; Hertig Randall and Chatton (n 441) 393. One example of such an unwritten constitutional right is the right to personal freedom, see BGE 89 I 92, at 3 f; Kley 319 ff. Another example is the right to secure one's livelihood, see BGE 121 I 367, at 2.

811 The Court has especially relied on the right to equality, protected by art. 4 of the Swiss Constitution of 1874. See Gonin and Bigler (n 702) 23.

812 Federal Council, *Botschaft über eine neue Bundesverfassung*, 20 November 1996, FG 1997 I 1, at 115. More generally, a range of constitutional and statutory provisions have been enacted or amended to reflect the Swiss Federal Tribunal's case law. See for instance Federal Council, *Botschaft über die Genehmigung und die Umsetzung des Notenaustauschs zwischen der Schweiz und der EG betreffend die Übernahme der EG–Rückführungsrichtlinie* (*Richtlinie 2008/115/EG*) *und über eine Änderung des Bundesgesetzes über die Ausländerinnen und Ausländer* (*Automatisierte Grenzkontrolle, Dokumentenberaterinnen und Dokumentenberater, Informationssystem MIDES*), 18 November 2009, FG 2009 8881, at 8901 (regarding art. 81(2) FA-FN); Federal Council, *Botschaft zur Änderung des Strafgesetzbuches* (*Allgemeine Bestimmungen, Einführung und Anwendung des Gesetzes*) *und des Militärstrafgesetzes sowie zu einem Bundesgesetz über das Jugendstrafrecht*, 21 September 1998, FG 1999 II 1979, at 2000 (on title 2 of the SCrimC), 2062 (regarding art. 50 SCrimC), and 2087 (regarding art. 62c(2) phrase 2 SCrimC).

813 Seiler (n 712); Albrecht (n 712).

814 Ehrenzeller (n 638); Papaux (n 105); Amstutz and Niggli (n 105).

815 There is an analogous uneasiness vis-à-vis judges' contribution to the formation of international law, see Chapter 4, section 3 (*infra*).

Swiss foreign affairs give prominence to some areas of international law, while other areas are relatively unimportant in practice. This influences the issues likely to be brought before Swiss courts. The monism of the Swiss legal order entails that international law can immediately be applied by Swiss courts once it becomes binding on their State. Courts hence typically interpret international laws that have not gone through a domestic legislative filter. The rank of international law in the Swiss legal order is not settled, and in some cases, especially in connection with the so-called 'Schubert Praxis', courts have made domestic laws trump international law. A similar ambivalence can be noticed regarding direct effect, which courts interpret in a way that is at times open, at times closed towards international law. In this context, courts' interpretative reasoning lacks predictability, clarity, and consistency, and it does not demonstrably conform with the interpretative methods of international law.

Courts' activity, including as regards international legal issues, is conditioned by several principles that structure the Swiss polity. Federalism protects the interests and competences of the cantons. Linguistic diversity influences the composition of the federal authorities, and it impacts federal legislation and judicial proceedings. It may also create interpretative divergence. Another important constraint on Swiss judges is their duty to abide by the law and to respect international law, which flows from the Swiss constitutional principle of the rule of law. Instruments of direct democracy give Swiss voters the possibility to shape Switzerland's foreign policy. As a result, clashes between domestic and international law may come to the fore in the courts. The supremacy of the federal legislature over other Swiss authorities explains Switzerland's weak system of judicial review, and Swiss judges' deference towards federal acts, especially when the legislature willingly derogates from international law.

The Swiss judiciary has several layers. The Swiss Federal Tribunal has jurisdiction over international legal issues, except for some foreign relations matters. Nonetheless, the Court often defers to other federal authorities, at least with regard to some questions of international law. Swiss courts have the duty to apply international law and to respect the State's international obligations. While the Swiss legal order is committed to the rule of law, Swiss judges are not insulated from the influence of politics. They are elected by the parliament or, in some cases, by the people. Moreover, they are in office for a limited period. Yet judges' accountability towards their constituency is hampered by the fact that rulings typically only reflect the opinion of the majority. As regards Swiss courts' interpretative approach, the Swiss Federal Tribunal endorses 'pragmatic methodological pluralism', which consists in a result-oriented balancing of considerations yielded by textual, teleological, systematic, and historical

interpretation. Judicial decisions are not typically acknowledged as a source of domestic law by the State authorities. However, judicial decisions influence the interpretation of the law in subsequent cases. Moreover, the Swiss Federal Tribunal has contributed to the identification, formation, and modification of domestic law, including constitutional law.

PART 2

Why Interpret?

CHAPTER 4

The Legal Effect of Domestic Rulings in International Law

> Theories which emphasize the incompleteness of the law usually argue that courts have a dual function: to apply law and to create new or revise old law. The prevalence of interpretation, however, seems to belie this view. Interpretation straddles the divide between the identification of existing law and the creation of a new one.[816]

1 Introduction

In this chapter, I examine the legal effect of domestic rulings in international law. I argue that this effect is both static and dynamic.[817] First, domestic courts enable States to respect their international obligations. They do so by enforcing international law domestically (*infra*, section 2). Second, from the perspective of the sources of international law, domestic judicial decisions also have a dynamic effect on international law, as they contribute to shaping it, on the one hand, and help interpreters ascertain it, on the other hand (*infra*, section 3).[818] I explain my reasons for focusing on art. 38 ICJ Statute in Chapter 2, section 5 (*supra*).

Why highlight the legal effect of domestic rulings in international law? Simply put, because a normative argument about how domestic courts must interpret international law requires understanding the essence and characteristics of their activity, and its relevance and stakes. Joseph Raz has observed

816 Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 78) 224 f.

817 I develop this further in Odile Ammann, 'How Do and Should Domestic Courts Interpret International Law? Insights From the Jurisprudence of H.L.A. Hart and Duncan Kennedy' (2019) Transnational Legal Theory (forthcoming).

818 On this issue, see Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 48 ff.

that answering the question of *how* interpretation must be conducted (with regard to both legal acts and other interpretative objects) must start with an account of *what* interpretation is, and of *why* it is necessary and important (*supra*, Introduction, section 2).

Part 1 of this book revolved around the question 'What is interpretation?', and more precisely around the question: what is the nature and essence of domestic (especially Swiss) courts' interpretation of international law? To answer this question, I have defined the scope of my inquiry (Chapter 1), laid its conceptual groundwork (Chapter 2), and provided context on the Swiss legal order (Chapter 3).

In Part 2, my goal is to address Joseph Raz's second question – *why* interpret? In other terms, why is legal (and, more specifically, judicial) interpretation 'central to legal practices'?[819] As Raquel Barradas de Freitas notes, the word 'central' can designate the predominance of legal interpretation in legal practice, but also (and more convincingly) its instrumental role (ie, 'its relevance to the pursuit of a series of ends').[820] The 'why' question is distinct from, and prior to, the question of *how* to interpret.[821]

While I adopt Raz's three-pronged structure of inquiry, my endeavor differs from his legal philosophical analysis of interpretation (*supra*, Introduction, section 2), and from his approach to the 'why' question. Instead of taking the perspective of an observer of the practice, as Raz does, I answer the 'why' question by analyzing the law as a participant in the practice. Unlike Raz, who looks at domestic law, my focus lies on international law.

As much of international legal scholarship confirms,[822] it is tempting to understand Raz's 'why' question as one that is about the 'role' of domestic courts

819 Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 78) 223.

820 Barradas de Freitas (n 127) 45. See also ibid 273 ff. Barradas argues that interpretation plays an instrumental role in that it makes the exercise of legal authority possible. By making the law intelligible, it helps individuals understand what the law requires, and hence be guided by it. See ibid 278.

821 Joseph Raz states that understanding the importance of legal interpretation is necessary 'to evaluate the different [philosophical] accounts of legal interpretation' provided by legal theorists. See Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 78) 225.

822 Weill (n 61); Sloss (n 120); Jonathan I Charney, 'International Criminal Law and the Role of Domestic Courts' (2001) 95 American Journal of International Law 120; Henry G Schermers, 'The Role of Domestic Courts in Effectuating International Law' (1990) 3 Leiden Journal of International Law 77; Falk (n 50); Bradley and Goldsmith (n 171) ch 2.

when they interpret international law.[823] The term 'role', however, is multifaceted and ambiguous. A role can be captured from a descriptive or from a normative angle.[824] It can be analyzed through the lens of domestic or international law. It can be defined from a legal perspective (ie, by highlighting courts' or States' legal duties and authority), but also from a psychological or sociological perspective, etc. This role may differ depending on the source, norm, and substantive area of international law under scrutiny.[825] Accordingly, scholarship addressing the 'role' of domestic courts in the interpretation of international legal acts is a thicket that is hard to penetrate.[826]

A closely related point, and a distinctive feature of recent scholarly analyses, is that many authors adopt functionalist approaches. This should not surprise us in light of the aforementioned comments, since functionalism is an epistemic method that focuses on the *role* (or purpose) a given object serves – this role is deemed to have explanatory value. To illustrate, scholars have enumerated domestic courts' modes of 'engagement'[827] with international law, or the range of 'functions' these courts fulfill when interpreting it.[828] Functionalist approaches have often been used by international lawyers,[829] eg with regard to international courts,[830] and they have also been popular in domestic law.[831]

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823 This observation has been made by Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 45.

824 See ibid 45 ff.

825 See ibid 47 f.

826 Besides the sheer quantity of contributions that have dealt with this topic, the terminologies, taxonomies, and theoretical approaches used to analyze what domestic courts do, must do, or should do when interpreting international law are diverse and sometimes intermingled. For an overview, see ibid 45 ff.

827 ILA, 'Preliminary Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61); ILA, 'Working Session Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61); ILA, '(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15).

828 Eg Weill (n 61) 179.

829 An early advocate of the 'functional approach' is Philip Jessup, 'The Functional Approach as Applied to International Law', *Proceedings of the Third Conference of Teachers of International Law* (Carnegie Endowment 1928).

830 Gleider Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014).

831 One illustration is provided by the concepts of 'translation' and 'soft originalism' used by some US constitutional legal scholars. On translation, see Lawrence Lessig, 'Understanding Changed Readings: Fidelity and Theory' (1995) 47 Stanford Law Review 395; Lawrence Lessig, 'Translating Federalism: United States v Lopez' (1995) 1995 Supreme Court Law

At first sight, functionalism is attractive because it allows us to draw a range of distinctions and to think analytically. Yet one important drawback of functionalism is its indeterminacy. How should we select among the myriad 'functions' courts perform? Why is one function deemed more important than others? Functionalism invites disagreement, as different functions are likely to be emphasized depending on the set of beliefs the scholar endorses. While purporting to be descriptive and analytically precise, functionalism substantially hinges on more fundamental value judgments.[832]

Rather than examining the 'functions' or causal 'impact' of domestic judicial decisions in international law, my aim, in this chapter, is to clarify why domestic courts' interpretations of international law are central (ie, important, instrumentally relevant) to the practice of international law. In other terms, I examine the legal effect of these rulings in international law.

As usual, caveats apply. First, the two aforementioned aspects (ie, the law-applying, 'static' facet of domestic courts' activity, versus its jurisgenerative, 'dynamic' effect)[833] are two sides of the same coin.[834] By enforcing international law domestically as international law requires States to do, domestic courts inevitably make law. Courts do so with respect to the relationship between domestic and international law, but also regarding the content of international law, subject to the framework established by art. 38 ICJ Statute. Second, in this chapter I am not yet evaluating domestic courts' activity. My goal, at this stage, is to clarify the legal consequences of their rulings in international law. Third, I analyze this effect in general terms, without focusing on particular norms and domains of international law. However, the effect of domestic rulings varies depending on the norm and substantive area of international law at stake.[835] Fourth, I focus on the effect of domestic rulings in *international* law. The effect of Swiss courts' rulings in domestic law is addressed in Chapter 3 (*supra*). Fifth,

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Review 125. On soft originalism, see Cass R Sunstein, 'Five Theses on Originalism' (1995) 19 Harvard Journal of Law & Public Policy 311. For a critique, see Michael J Klarman, 'Fidelity, Indeterminacy, and the Problem of Constitutional Evil' (1997) 65 Fordham Law Review 1739, 1753 ff.

832 This point has been brought to my attention by Michael Klarman.

833 On these two facets, see Edouard Dubout and Sébastien Touzé, 'La fonction des droits fondamentaux dans les rapports entre ordres et systèmes juridiques' in Edouard Dubout and Sébastien Touzé (eds), *Les droits fondamentaux : charnières entre ordres et systèmes juridiques* (Pedone 2009); Besson and Ammann (n 60) 7–9.

834 Tzanakopoulos and Methymaki (n 217). See also Antonios Tzanakopoulos, 'Domestic Courts in International Law' (*United Nations Audiovisual Library of International Law*, 2016) <legal.un.org/avl/ls/Tzanakopoulos_IL_video_1.html>.

835 Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 47 f.

the way international law is received in domestic legal orders is contingent on domestic law (Chapter 3, *supra*). These features may limit domestic courts' contribution to the sources of international law.

I now turn to the two legal effects of domestic rulings in international law, namely to their connecting (*infra*, section 2) and dynamic effect (*infra*, section 3).

2 Domestic Rulings as Means of Enforcement of International Law

A first legal effect of domestic judicial decisions on international law is that they facilitate the reception of international law in the domestic legal order. By enforcing international law domestically, they allow States to respect their international obligations (subject, of course, to the constraints established by domestic law in this respect, Chapter 3, *supra*).

International law, *qua* law, aims at being obeyed. This claim is implicit in all international legal norms, and explicit in some of them. For instance, the customary principle *pacta sunt servanda* codified in art. 26 VCLT provides that States must honor their treaty obligations. States cannot in principle rely on domestic law to justify a violation of these treaty obligations (art. 27 VCLT).[836] States must also respect CIL and general principles of international law *qua* sources of international law (art. 38 ICJ Statute), unless these States are excluded from the scope of their legal authority.[837]

A State's violation of its international obligations triggers its international responsibility. The conditions of this responsibility are exclusively defined by international law.[838] The ILC's Draft Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA), most of which are customary,[839] provide

836 See also PCIJ, case concerning the *Greco–Bulgarian 'Communities'*, advisory opinion, PCIJ Series B No 17, 31 July 1930, 4, at 32. States cannot even rely on constitutional law: PCIJ, case concerning the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, advisory opinion, PCIJ Series A/B No 44, 4 February 1932, 3, at 24; ICJ, case concerning *Avena and Other Mexican Nationals* (*Mexico v. United States*), judgment, ICJ Reports 2004, 31 March 2004, 12, at 65, para 139.

837 Eg if States are persistent objectors to a given norm of CIL, or in the case of regional custom.

838 ICJ, case concerning *Elettronica Sicula SpA* (*ELSI*) (*United States v. Italy*), judgment, ICJ Reports 1989, 20 July 1989, 15, at 51, para 73.

839 Some ARSIWA provisions remain contested, such as those on serious breaches and countermeasures: James Crawford, 'State Responsibility', *Max Planck Encyclopedia of Public International Law* (*Online Edition*) (Oxford University Press 2006) 65 <opil.ouplaw.com>.

that State responsibility arises whenever the State commits an internationally wrongful act,[840] ie, an act incompatible with its international obligations.[841] The decision of a domestic court is always attributable to the State, even when it exceeds the court's competence under domestic law.[842] Thus, if domestic rulings fail to respect the State's international obligations, they trigger their State's international responsibility and its duty to provide reparation.[843]

One corollary of States' duty to obey international law is their duty to apply and enforce international law domestically through their organs, so that international law can rule.[844] International law is weakly institutionalized and lacks an international police force. Therefore, it must primarily rely on the State for its domestic enforcement.[845] Exceptionally, international law defines the modalities of its enforcement, eg in IHRL,[846] or in the context of remedies for breaches of international law.[847]

States' duty to obey international law may be expressed or reinforced by more specific positive international legal duties, rights, or powers.[848] The terminology used in international law to characterize these duties or competences is diverse and often inconsistent (eg the duty or competence to 'enforce', 'apply', 'interpret', 'implement', or 'give effect' to international law, to 'monitor' its application, etc.), which makes it necessary to interpret each provision to

840 Art. 1 ARSIWA.

841 Art. 12 ARSIWA.

842 Art. 4, 7 ARSIWA.

843 PCIJ, case concerning the *Factory at Chorzów* (*Germany v. Poland*), judgment, claim for indemnity, merits, PCIJ Series A No 17, 13 September 1928, 4, at 29.

844 Leo Gross, 'States as Organs of International Law and the Problem of Autointerpretation', *Essays on International Law and Organization* (*Vol I*) (Transnational Publishers, Inc/ Martinus Nijhoff 1984) 378 f.

845 Even international judges play a limited role with regard to enforcement, see Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' (n 85) 425. Some international bodies monitor the domestic enforcement of international law. One example is the Committee of Ministers of the Council of Europe, which monitors the domestic enforcement of ECtHR rulings, see Samantha Besson, 'Les effets et l'exécution des arrêts de la Cour européenne des droits de l'homme – Le cas de la Suisse' in Bernhard Ehrenzeller and Stephan Breitenmoser (eds), *Die EMRK und die Schweiz / La CEDH et la Suisse* (Schulthess 2010) 160 ff.

846 Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2014) 101 ff.

847 ICJ, case concerning *Avena and Other Mexican Nationals* (*Mexico v. United States*), judgment, ICJ Reports 2004, 31 March 2004, 12, at 59 f, para 121.

848 Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 47.

determine its legal implications. In some cases, international law explicitly requires or empowers States not only to give effect to their international obligations domestically, but also to interpret them.[849]

The domestic judicial application and enforcement of international law is sometimes explicitly mandated by international law. IHL for instance tasks domestic institutions, including courts,[850] with its enforcement. Other examples include ICL[851] or IHRL.[852] In international environmental law, access to courts is sometimes explicitly mandated.[853] The ICJ has occasionally required that specific measures be taken by domestic courts to guarantee domestic compliance with international law,[854] although domestic judges have sometimes shown resistance.[855]

While some authors argue that international law increasingly imposes duties upon domestic organs,[856] conceptually, it is the *State's* (and not domestic courts') international legal duty to respect international law.[857] States are free to choose the means by which to give effect to their international obligations. However, the nature and content of some obligations may require

849 See ibid. The ECHR for instance is primarily interpreted by State institutions.

850 See art. 49(2), art. 50(2), art. 129(2), and art. 146(2) of the four Geneva Conventions of 1949, respectively. On requirements of domestic enforcement in general, see Weill (n 61) 7 foonote 17.

851 Art. 1 ICC Statute. See also art. VI of the Genocide Convention of 9 December 1948.

852 Eg art. 2(3) ICCPR. The UN treaty bodies have stressed the importance for States to grant judicial remedies, so that individuals can invoke relevant international human rights obligations. See the examples mentioned by Künzli, Eugster, and Spring (n 442) 4, note 6.

853 Art. 9 Aarhus Convention. The importance of judicial review is also stressed in soft law instruments, eg the Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium on 18–20 August 2002.

854 ICJ, case concerning *Avena and Other Mexican Nationals* (*Mexico v. United States*), judgment, ICJ Reports 2004, 31 March 2004, 12, at 59 f, para 121. See also Fikfak, 'Reinforcing the ICJ's Central International Role? Domestic Courts' Enforcement of ICJ Decisions and Opinions' (n 63).

855 A well-known example is the *Avena*/*Medellín* saga. On the other hand, some domestic courts explicitly underscore their State's duty to apply international law domestically. The Swiss Federal Tribunal for instance, early on in its case law, emphasized the State's duty to enforce international law through its institutions, eg BGE 49 I 188, at 3. The Court especially highlights judicial enforcement with respect to IHRL. See BGE 123 II 595, at 7 c); BGE 117 Ib 367, at 2 e).

856 Ward Ferdinandusse, 'Out of the Black-Box? The International Obligation of State Organs' (2003) 29 Brooklyn Journal of International Law 45.

857 This is also how the ICJ phrased the issue in the case concerning *Avena and Other Mexican Nationals* (*Mexico v. United States*), judgment, ICJ Reports 2004, 31 March 2004, 12, at 60, para 121. See also Tzanakopoulos and Methymaki (n 217) 6.

that States take certain measures to ensure that their courts will give effect to international law.

States' duty to abide by international law, and thus to implement it domestically and to act as 'officials of international law',[858] explains why scholars highlight that domestic courts can, do, and/or should act as 'enforcers',[859] 'agents',[860] or 'faithful trustees'[861] of international law. Scholars describe domestic courts as the 'first port of call'[862] to adjudicate international legal issues and, when international adjudication is unavailable, as the first and only locus of international legal interpretation.[863]

Of course, the State's duty to enforce international law via its organs may conflict with other duties under domestic and especially constitutional law. From the perspective of international law, domestic law is no valid justification for disregarding international law, including its interpretative methods.[864] In such cases, courts experience a 'double bind',[865] as they must respect two

858 Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 European Journal of International Law 315; Samantha Besson, 'Sovereignty, International Law and Democracy' (2011) 22 European Journal of International Law 373, 375.

859 Rodney Harrison, 'Domestic Enforcement of International Human Rights in Courts of Law: Some Recent Developments' (1995) 21 Commonwealth Law Bulletin 1290; Masters (n 331); Oona A Hathaway and Scott J Shapiro, 'Outcasting: Enforcement in Domestic and International Law' (2011) 121 Yale Law Journal 252; Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (n 59); Susan Deller Ross, 'Enforcing Women's International Rights at Home: International Law in Domestic Courts', *Women's Human Rights: The International and Comparative Law Casebook* (University of Pennsylvania Press 2008); M Shah Alam, 'Enforcement of International Human Rights Law by Domestic Courts in the United States' (2004) 10 Annual Survey of International and Comparative Law 27; Richard F Oppong and Lisa C Niro, 'Enforcing Judgments of International Courts in National Courts' (2014) 5 Journal of International Dispute Settlement 344; Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 European Journal of International Law 815; Conforti and Francioni (n 120); Fikfak, 'Reinforcing the ICJ's Central International Role? Domestic Courts' Enforcement of ICJ Decisions and Opinions' (n 63); Weill (n 61) 117; Schermers (n 822); Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 New York University Journal of International Law and Politics 501, 501, footnote 1.

860 Nollkaemper, *National Courts and the International Rule of Law* (n 47) 8.

861 Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford University Press 2015).

862 Nollkaemper, *National Courts and the International Rule of Law* (n 47) 11 f.

863 Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (n 57) 151.

864 Art. 27 VCLT.

865 Nollkaemper, *National Courts and the International Rule of Law* (n 47) 14.

irreconcilable legal duties of the State. These conflicts faced by domestic courts have spilt a lot of ink, although it is important to highlight that in many instances, the conflict exists not only between international and domestic law, but also within domestic law.[866] Scholars have highlighted 'patterns of national contestation' of international law, patterns which domestic courts contribute to tracing.[867] Yet domestic courts also resolve conflicts by giving preference to what international law requires. In most areas of international law, contestation is the exception rather than the rule.[868]

Existing scholarship on conflicts between domestic and international law is chiefly descriptive, in the sense that it primarily maps the existing practice and rarely examines *how* domestic courts must (or should) resolve conflicts. This question is complex, because the answer to it depends on the provisions at stake and, importantly, hinges on considerations of moral and political philosophy. The issue of how conflicts must (or should) be resolved is beyond the scope of my study, but my account has implications for how courts must handle such conflicts. The thesis I defend is that courts must use specific methods to ascertain international law (ie, textual, systematic, purposive and, if applicable, historical interpretation), and that they should strive to reason predictably, clearly, and consistently. They must do so regardless of how they resolve clashes between domestic and international law.

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866 For an example, see BGE 139 I 16.

867 Raffaela Kunz, 'Judging International Judgments Anew? The Human Rights Courts Before Domestic Courts' European Journal of International Law (forthcoming); Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 International Journal of Law in Context 197; Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2015). Curtis Bradley argues that the US Supreme Court is a 'filter' between international and US law that ensures that international law fits 'the structure and values of the constitutional system', see Bradley (n 70) 102. André Nollkaemper uses the metaphors of 'safety valve[s] or gate-keeper[s]', see Nollkaemper, *National Courts and the International Rule of Law* (n 47) 303. Harold Koh views domestic actors (including courts) as a 'transmission belt' which mediates between international law and the domestic legal order: Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599, 2651. *Contra* Knop (n 859) 505.

868 Christopher McCrudden, 'Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW' (2015) 109 American Journal of International Law 534, 538.

3 Domestic Rulings as Contributors to the Sources and Interpretation of International Law

States' duty to apply and enforce international law domestically, including via their courts, is not the only reason why domestic courts' interpretations are central to international law. First, from the perspective of the sources of international law, domestic rulings can collectively contribute to the formation and modification of international law (*infra*, 3.1). Second, from the perspective of any domestic or international interpreter of international law, domestic judicial decisions are auxiliary means (or 'subsidiary means', as per art. 38(1)(d) ICJ Statute) that assist her in her interpretative task (*infra*, 3.2). Of course, domestic rulings have an analogous effect in domestic legal orders (*supra*, Chapter 3, 4.2.7). They can even, under certain conditions and in some States, exercise domestic legal authority beyond the particular case. Yet in this section, I focus on the place of domestic rulings in international law.

While domestic and international law increasingly overlap in terms of their respective subject matters and of the authorities that apply them, international and domestic lawmaking processes remain distinct (*supra*, Chapter 1, section 6). Even this distinction is not as sharp as it might seem, however. The sources of domestic and international law are intertwined due to the fact that States have the power to collectively create international law. When two or more States conclude a treaty, for instance, they make international law.[869] States also collectively provide evidence of the two constitutive elements of CIL, State practice and *opinio juris*. Furthermore, their acts can be a manifestation of the domestic recognition of at least some general principles of international law, ie, those applied *in foro domestico*. What differs between domestic and international lawmaking processes is that the latter involve States *qua* primary lawmakers.

The place of domestic rulings in the sources of international law is ambiguous in practice and in scholarship. While there is agreement (and rightly so) that domestic rulings are not a source of international law (*infra*, 3.1.1–3.1.3),[870]

869 Gross (n 844) 379.

870 Some courts explicitly reject the idea that domestic rulings do and/or should have legal authority (*qua* source) on the international plane: ICJ, 'Public sitting held on Monday 12 September 2011, at 10 a.m., at the Peace Palace, President Owada presiding, in the case concerning *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*)', <www.icj-cij.org/docket/files/143/16677.pdf>, at 21, cited in Weill (n 61) 157. See also ICTY (Trial Chamber II), *Prosecutor v. Zoran Kupreškić and Others*, trial judgment, Case No IT-95-16-T, 14 January 2000, para 540, cited in Aldo Zammit Borda, 'The Use of Precedent as Subsidiary Means and Sources of International Criminal Law' (2013) 18 Tilburg Law Review 65, 69. Even national courts such as the UK House of Lords have

their precise categorization is often left open (see also *supra*, Chapter 1, 2.3). Legal scholars and practitioners often mention that domestic courts 'contribute' to the 'development' of international law,[871] or that they may 'facilitate the determination of the contents of [international] obligations'.[872] They consider that their rulings 'may be relevant' from the perspective of the identification of international law.[873] The ILA Study Group on Domestic Courts notes that domestic courts, 'as organs of the State, necessarily affect the content of norms of international law whenever they engage with them. They serve as agents of development (or corrosion and decay) of international law norms'.[874] The role of domestic courts as 'agents of development'[875] of international law has been highlighted with regard to general international law (eg the law of international responsibility[876] or the international law of jurisdiction),[877]

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pointed out that they should not make law for other subjects of international law, including other States. See Lord Hoffmann in *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya*, (2006) UKHL 26, para 63, cited in Weill (n 61) 157.

871 Nollkaemper, *National Courts and the International Rule of Law* (n 47) 10; Tams and Tzanakopoulos (n 147); Veronika Fikfak, 'Judicial Strategies and Their Impact on the Development of the International Rule of Law' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2016); Iovane (n 182); Harmen van der Wilt, 'Domestic Courts' Contribution to the Development of International Criminal Law: Some Reflections' (2013) 46 Israel Law Review 207; Jennings (n 40); Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (n 126) 16. See also Devika Hovell, 'A Dialogue Model: The Role of the Domestic Judge in Security Council Decision-Making' (2013) 26 Leiden Journal of International Law 579, 592. For a legal practitioner's view, see Gérard V La Forest, 'The Expanding Role of the Supreme Court of Canada in International Law Issues' (1996) XXXIV Canadian Yearbook of International Law 89, 100.

872 Nollkaemper, *National Courts and the International Rule of Law* (n 47) 10.

873 ILC Secretariat, 'Identification of Customary International Law: The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law' (n 185) 3, para 4.

874 ILA, 'Preliminary Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61) 13.

875 Tams and Tzanakopoulos (n 147).

876 Simon Olleson, 'Internationally Wrongful Acts in the Domestic Courts: The Contribution of Domestic Courts to the Development of Customary International Law Relating to the Engagement of International Responsibility' (2013) 26 Leiden Journal of International Law 615. See however, with regard to State responsibility: Stephan Wittich, 'Domestic Courts and the Content and Implementation of State Responsibility' (2013) 26 Leiden Journal of International Law 643.

877 Roger O'Keefe, 'Domestic Courts as Agents of Development of the International Law of Jurisdiction' (2013) 26 Leiden Journal of International Law 541.

IHL,[878] ICL,[879] and IHRL.[880] Scholars have also discussed the role domestic courts can play in 'closing gaps' in international law, for instance in the law of immunities.[881]

Although most international lawyers acknowledge a *de facto* 'influence' of domestic rulings on international law, domestic judicial lawmaking is often obfuscated or presented as an oblique phenomenon. Hersch Lauterpacht has probably endorsed the boldest position in this respect, suggesting that their decisions are a 'source' of international law.[882] Only few scholars use such forceful terminology.[883] Apart from these exceptions, the reluctance to deem domestic rulings authoritative on the international plane likely goes back to the controversial nature of judicial lawmaking in domestic law (*infra*, Chapter 5, 4.2). Moreover, as previously mentioned, the entrenchment of domestic rulings in art. 38 ICJ Statute is equivocal. Finally, the effect of domestic courts' interpretation on the formation and evolution of international law is not monolithic. It depends on the source of international law at stake, on whether the scope of a given norm is inter- or intrastate, on whether mechanisms of international adjudication restrict domestic courts' interpretative freedom and, of course, on courts' rights, duties, and authority in domestic law.[884] Therefore, the effect of these rulings must be assessed carefully.

In this section, my goal is to show that domestic rulings, despite States' and international lawyers' reluctance to acknowledge it, contribute to the formation, modification, and ascertainment of international law. I analyze the legal effect of these rulings with regard to treaty law (3.1.1), CIL (3.1.2), and general

878 Yaël Ronen, 'Silent Enim Leges Inter Arma – but Beware the Background Noise: Domestic Courts as Agents of Development of the Law on the Conduct of Hostilities' (2013) 26 Leiden Journal of International Law 599.

879 van der Wilt (n 871).

880 Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56); Iovane (n 182).

881 August Reinisch, 'To What Extent Can and Should National Courts "Fill the Accountability Gap"?' (2013) 10 International Organizations Law Review 572. See also Karel Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap' (2004) 25 Michigan Journal of International Law 1159.

882 Lauterpacht, 'Municipal Decisions as Sources of International Law' (n 50).

883 Hovell (n 871) 582, 591 ff. See also Jennings (n 40) 3 f. André Nollkaemper, in an article on ICL, assesses whether domestic courts are 'sources' of international law: Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182).

884 Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 48.

principles of international law (3.1.3). I also highlight the assistance domestic rulings provide to other interpreters in future interpretations of international law, pursuant to art. 38(1)(d) ICJ Statute (3.2).[885]

Of course, domestic rulings also constitute State practice in a different respect, on which I do not focus here: like every act of a State organ, they are attributable to the State for the purposes of international responsibility.[886]

3.1 *Domestic Rulings in the Sources of International Law (Art. 38(1)(a)–(c) ICJ Statute)*

3.1.1 Treaties

Art. 31–33 VCLT are widely held to codify the CIL of treaty interpretation (on this issue, see *infra*, Chapter 6). Of particular interest for the purposes of this study is art. 31(3)(b) VCLT, which states that 'There shall be taken into account, together with the context [of the treaty]: [...] b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.

The ILC's Special Rapporteur on 'subsequent agreements and subsequent practice', Georg Nolte, addressed the 'legal significance' of domestic case law in a report published in 2016.[887] Nolte merely observes that domestic rulings *qua* subsequent practice 'do not raise specific problems'.[888] Indeed, given that such rulings are attributable to the State,[889] they can, together with other instances of domestic and foreign State practice, constitute subsequent practice in the sense of art. 31(3)(b) VCLT.[890] This constitutive aspect is arguably less central

885 See already ibid 49 f.

886 Art. 4 ARSIWA; ILA Committee on Formation of Customary (General) International Law, 'Final Report: Statement of Principles Applicable to the Formation of General Customary International Law' (2000) 17 <www.ila-hq.org/index.php/committees?committeeID=22>.

887 ILC, 'Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur' (2016) UN Doc A/CN.4/694 36 ff para 95 ff.

888 See ibid 37 para 96.

889 Gerhard Hafner, 'Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013) 113.

890 Rosanne van Alebeek, 'Domestic Courts as Agents of Development of International Immunity Rules' (2013) 26 Leiden Journal of International Law 559, 562; Marcin Kaldunski, 'The Law of State Immunity in the Case Concerning Jurisdictional Immunities of the State (Germany v. Italy)' (2014) 13 The Law and Practice of International Courts and Tribunals 54, 99; ILC Secretariat, 'Identification of Customary International Law: The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law' (n 185) 3 para 4; ILA, '(Study Group on) Principles on the Engagement

for treaty law than what is the case with CIL, as custom cannot exist without its constitutive elements, namely State practice and *opinio juris*. This also explains why domestic judicial decisions are described by the ILC as elements providing evidence of State practice of *opinio juris*,[891] contrary to the terminology that is typically used to describe the contribution of domestic rulings to the identification of treaty law and general principles of international law. Still, subsequent practice, when it exists, forms an integral, constitutive part of treaty law too.

This link between domestic rulings and subsequent practice is also reflected in the practice of international law. International criminal tribunals in particular have referred to domestic rulings *qua* subsequent practice,[892] albeit not always explicitly. Two examples of implicit versus explicit references to subsequent treaty practice mentioned by André Nollkaemper are the rulings of the ICTY Trial Chamber in *Krstić* and *Jelisić*.[893] In *Krstić*, the Chamber referred to art. 31 f VCLT when 'look[ing] for guidance in the practice of States, especially their judicial interpretations and decisions'.[894] In *Jelisić*, it mentioned that it had 'taken into account' '[t]he practice of States, notably through their national courts' after citing the VCLT's treaty interpretation provisions.[895] It referred (without providing any details) to the Eichmann ruling of the Supreme Court of Israel, as well as to judgments of Equatorial Guinean, Vietnamese, Ethiopian, and German courts.[896] While the Chamber did not mention art. 31(3)(b) VCLT in *Krstić*, it did note the relevance of domestic courts *qua* 'subsequent practice' in *Jelisić*.[897]

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of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15) 3. See also Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56).

891 Draft conclusions 6(2) and 10(2), ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (2018) UN Doc A/73/10 119.

892 ILC, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation by Georg Nolte, Special Rapporteur' (2013) UN Doc A/CN.4/660 18 f para. 41.

893 Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 280.

894 ICTY (Trial Chamber I), *Prosecutor v. Radislav Krstić*, Case No IT-98-33-T, judgment, 2 August 2001, para 541, cited by Nollkaemper, ibid.

895 ICTY (Trial Chamber), *Prosecutor v. Goran Jelisić*, Case No IT-95-10-T, judgment, 14 December 1999, para 61, cited by Nollkaemper, ibid 279.

896 Ibid, para 61, footnote 80.

897 Ibid, para 61. See also Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 280.

The ILC commentary to the VCLT does not specify how subsequent practice is to be ascertained. However, art. 31(3)(b) VCLT makes it clear that domestic rulings reflect subsequent treaty practice if they establish the understanding *of the parties*. Hence, they cannot merely be a manifestation of the unilateral (auto-)interpretation of the treaty by one State. It is not necessary for the practice to express the understanding of *all* the parties, however, as the word 'all' was deliberately omitted by the ILC in the drafting process.[898]

International lawyers often limit themselves to general remarks as to the requirements this practice must fulfill to be relevant from the perspective of the VCLT, eg that it must reflect 'a certain constant pattern of state conduct'.[899] To ensure predictability, clarity, and consistency in the way subsequent practice is ascertained, it seems helpful to interpret the notion of practice of art. 31(3)(b) VCLT in light of the notion of State practice in CIL. Like State practice in CIL (see also *infra*, 3.1.2), subsequent treaty practice must reach a minimal threshold of coherence (or uniformity), constancy (or regularity), and generality (or representativeness).[900] Otherwise, it cannot express *the parties'* understanding. These requirements (coherence, constancy, generality) entail that domestic rulings, to constitute subsequent practice, must (i) not contradict the practice of other State organs (so that the practice is coherent), (ii) not be isolated rulings, but belong to an established practice, and (iii) emanate from the courts of a sufficiently large number of States. The requirements are even stricter for multilateral treaties.[901] Of course, some differences with State practice in CIL do exist. Subsequent treaty practice pertains to the interpretation of written norms upon which the parties have previously agreed, and it must establish 'the agreement of the parties' (art. 31(3)(b) VCLT).

Assessing whether the aforementioned conditions are fulfilled indisputably involves discretion. International courts have not always been careful when ascertaining subsequent practice on the basis of domestic rulings.[902] It is also important to note, along with Samantha Besson, that 'the effects of domestic courts' judicial interpretation on the interpreted norm [ie, on customary international legal norms and general principles] are greater than they are in the case of treaties'[903] because of the process through which these norms are

898 ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 222.

899 Hafner (n 889) 113.

900 On these three requirements: Besson and Ammann (n 60) 110 ff.

901 Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 280.

902 See ibid.

903 Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 48.

created and changed. This explains why domestic courts have been relatively neglected in the ascertainment of subsequent treaty practice. Nonetheless, domestic rulings can be constitutive of this practice and must be examined carefully.

3.1.2 Customary International Law

Besides reflecting subsequent treaty practice (*supra*, 3.1.1), domestic rulings can help determine (or, to use the ILC's terminology,[904] provide evidence of) State practice and/or *opinio juris*, the two constitutive elements of CIL.[905]

As previously pointed out, the contribution of domestic judicial decisions to the formation and evolution of CIL is more central than with respect to treaties (*supra*, 3.1.1) and general principles (*infra*, 3.1.3). Indeed, the very existence of custom depends on the presence of its constitutive elements. Treaties, by contrast, exist before a subsequent treaty practice develops. The absence of such a practice does not yield the conclusion that there is no treaty norm. As regards general principles, their domestic recognition does not suffice to establish their existence in international law, which must be determined through analogical reasoning. Moreover, some general principles of international law exist regardless of their recognition in *foro domestico* (on these two types of general principles, see *infra*, 3.1.3).

When do domestic rulings provide evidence of State practice and/or *opinio juris* in the context of CIL? The ILC's recent work on custom shows that many aspects of the identification of CIL remain unsettled. Still, some are widely established. State practice and *opinio juris* must satisfy the requirements of coherence (or uniformity), constancy (or regularity), and generality (or representativeness).[906] The terminology used to refer to these different requirements is

904 Draft conclusion 3, ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891). The ILC notes that the term 'evidence' is to be understood in a broad sense, and that it does not refer to a formal procedure in which evidence is produced and assessed. See footnote 263, in ILC, 'Report on the Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016)' (2016) UN Doc A/71/10 84.

905 Art. 24 ILC Statute states the following: 'The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice *and of the decisions of national and international courts on questions of international law* [...]' (emphasis added).

906 Eg ILA Committee on Formation of Customary (General) International Law (n 886) 20 ff; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 24 f. See also draft conclusions 7–8 in ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

highly inconsistent,[907] however, and the practice (both domestic and international) tends not to take them seriously enough (*infra*, Chapters 6 and 8).[908]

The ILC cites domestic rulings among the forms of evidence of both State practice and *opinio juris*.[909] The Special Rapporteur's analysis of the authority of domestic rulings from the perspective of CIL is very brief, and he only mentions their relevance *qua* State practice.[910] In 2016, the ILC's Secretariat conducted a comprehensive survey of international courts' reliance on domestic rulings to identify custom.[911] Indeed, international courts such as the PCIJ and its successor, the ICJ,[912] the ICTR,[913] and especially the ICTY,[914] have referred to domestic rulings *qua* State practice and/or *opinio juris*. Courts seldom distinguish between the two constitutive elements of CIL in this context.[915] As

907 For an attempted clarification: Besson and Ammann (n 60) 110 ff.

908 On the ICTY: Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 285. On the Swiss practice: Besson and Ammann (n 60).

909 ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891). See draft conclusions 5, 6(2), and 10(2).

910 ILC, 'Second Report on Identification of Customary International Law by Special Rapporteur Sir Michael Wood' (n 578) 42 para 58.

911 ILC Secretariat, 'Identification of Customary International Law: The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law' (n 185).

912 PCIJ, case concerning the *s.s. 'Lotus'* (*France v. Turkey*), judgment, PCIJ 1927 Series A No 10, 7 September 1927, 25 ff; ICJ, *Jurisdictional Immunities of the State* (*Germany v. Italy; Greece intervening*), judgment, ICJ Reports 2012, 3 February 2012, 99, at 122 f, para 55; 125, para 61; and especially 131 ff, para 72 ff; see also 141 f, para 96; 143, para 101.

913 See the ILC Secretariat's remarks: ILC Secretariat, 'Identification of Customary International Law: The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law' (n 185) 28 ff para 44 ff.

914 As of 1 December 2015, the ICTY had referred to domestic rulings when identifying CIL in 49 out of 81 rulings: ibid 21, para 36. See also Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 281 ff. For references to domestic case law, see ICTY (Appeals Chamber), *Prosecutor v. Dražen Erdemović*, judgment, Case No IT-96-22-A, 7 October 1997, joint and separate opinion of Judge McDonald and Judge Vohrah, para 50 and 55; ICTY (Trial Chamber II), *Prosecutor v. Anto Furundžija*, judgment, Case No IT-95-17/1-T, 10 December 1998, para 194 ff; ICTY (Appeals Chamber), *Prosecutor v. Duško Tadić*, opinion and judgment, Case No IT-94-1-T, 7 May 1997, para 641 f (where the Court deemed French case law 'instructive', but of lesser relevance given that it concerned domestic law).

915 ILC Secretariat, 'Identification of Customary International Law: The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law' (n 185) 22 f para 37 f.

the ILC Secretariat notes, some never refer to domestic rulings when identifying CIL, eg the ITLOS[916] or the WTO Appellate Body.[917] Domestic rulings are typically one piece of evidence among others which courts use to determine the existence of CIL.[918] The domestic practice also occasionally uses domestic rulings *qua* evidence of the constitutive elements of CIL, ie, State practice and *opinio juris*.[919] Scholars accept this as well,[920] although some emphasize State practice only.[921]

Domestic case law is, of course, not the only basis for ascertaining CIL.[922] When it is inconsistent, scarce, or not representative of a *longa consuetudo*, other instances of domestic (legislative or executive) practice and/or *opinio juris* may be used. The lack of domestic 'judicial custom'[923] is thus not necessarily the end of the matter with regard to CIL.

Should rulings that conflict with the position of the other branches of government be deemed an expression of State practice and/or *opinio*? While some consider that what is decisive is whether the body at stake has the final authority on a given issue under domestic law[924] (which is not always clear,[925] see

916 See ibid 18 f para 31 ff. However, individual judges of the ITLOS have done so, see ibid 19, para 34.

917 See ILC Secretariat, 'Identification of Customary International Law: The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law' (n 185) 20, para 35.

918 Eg ibid 24, para 39.

919 Besson and Ammann (n 60) 77 f.

920 Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 281 f; Ingrid Wuerth, 'International Law in Domestic Courts and the Jurisdictional Immunities of the State Case' (2012) 13 Melbourne Journal of International Law 819, 3. See also Javier Dondé Matute, 'International Criminal Law Before the Supreme Court of Mexico' (2010) 10 International Criminal Law Review 571, 575.

921 ILA Committee on Formation of Customary (General) International Law (n 886) 18. See also the following statement of the ILA Study Group on Domestic Courts, in its 2014 Working Session Report: 'The traditional position in international law is that domestic courts engage in state practice, and thus they effectively make international law, at least on a micro-level'. ILA, 'Working Session Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61) 3.

922 Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 285.

923 Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 60.

924 Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 284.

925 On the different approaches to conflicts between the judiciary and the executive, see Wuerth (n 920) 5, 10.

eg Chapter 3, 2.1.2 and 4.2.2, *supra*), others give preference to the executive's view.[926] The ILA Study Group on Domestic Courts considers that domestic rulings, to constitute State practice and/or *opinio*, must be accepted (or 'not "rejected"',[927] as the Study Group puts it) by the executive. The ILC, on the other hand, states that domestic judgments 'will count less if they are reversed by the legislature or remain unenforced because of concerns about their compatibility with international law'.[928] Yet it seems that especially when it comes to ascertaining *opinio juris*,[929] ie, the fact that an act is performed out of a sense of legal obligation, judicial decisions should carry more weight than the acts of other State organs.[930] Indeed, courts' institutional position requires them to base their rulings on legally relevant (as opposed to strategic)[931] reasons. It is worth stressing that this question arises if courts *contradict* the executive or the legislature, and *vice versa*, which is atypical in Switzerland (*supra*, Chapter 3, 4.2.2).

3.1.3 General Principles of International Law

Besides treaties and CIL, another source of international law consists in the 'general principles of law recognized by civilized nations' (art. 38(1)(c) ICJ Statute).[932] The German translation of the ICJ Statute uses the term 'Kulturvölker'. The term 'civilized' reflects an imperialistic view of international law.[933] It needs to be deleted given the commitment of international law to sovereign

926 ILA Committee on Formation of Customary (General) International Law (n 886) 18. On this question, see Wuerth (n 920) 3 ff.

927 ILA, '(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15) 4.

928 ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891) 128 para 5.

929 Ingrid Wuerth suggests that courts' institutional independence also justifies placing particular emphasis on their views to identify State practice: Wuerth (n 920) 19.

930 Eg ibid 9.

931 ILA Committee on Formation of Customary (General) International Law (n 886) 5.

932 It is worth pointing out that, conceptually, it is these principles' recognition (*qua* social fact) that constitutes a source of international law, not the principle itself.

933 On the imperialistic roots of international law, see eg Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 Harvard International Law Journal 1; Martti Koskenniemi, Walter Rech, and Manuel Jiménez Fonseca (eds), *International Law and Empire: Historical Explorations* (Oxford University Press 2017).

equality. However, proposals to amend the Statute in this sense have been unsuccessful.[934]

Unlike the 'subsidiary means' of art. 38(1)(d) ICJ Statute, general principles are a source of international law, but they are often considered of secondary importance compared to treaties and custom. They are deemed 'gap-fillers' that come into play when an issue is left open by other sources.[935] General principles are of two types: some are idiosyncratic to international law (like sovereign equality), while others originate from domestic practices (like good faith).[936] In the present study, the latter type of general principles, identified *in foro domestico*, is of particular interest.

How to identify general principles of domestic origin (ie, 'general principles of law', as opposed to 'general principles of international law *stricto sensu*')[937]? While general principles of this kind are 'traced to state practice',[938] including to 'judicial law',[939] it is important to note that this requirement of a practice of recognition is looser than the test applied to identify State practice and *opinio juris* in CIL. The existence of general principles of law primarily hinges on their recognition by States.

International courts (eg in ICL or IHRL) have identified general principles of law on the basis of national practices through analogical and/or comparative legal reasoning, although the methods they employ are not always transparent and comprehensive.[940] Sometimes, they have used domestic court

934 Giorgio Gaja, 'General Principles of Law', *Max Planck Encyclopedia of Public International Law* (*Online Edition*) (Oxford University Press 2013) para 2 <opil.ouplaw.com>.

935 Samantha Besson, 'General Principles in International Law: Whose Principles?' in Samantha Besson and Pascal Pichonnaz (eds), *Les principes en droit européen / Principles in European Law* (Schulthess 2011) 39, 48 ff; Filippo Fontanelli, 'The Invocation of the Exception of Non-Performance: A Case-Study on the Role and Application of General Principles of International Law of Contractual Origin' (2012) 1 Cambridge Journal of International and Comparative Law 119, 127.

936 Besson, 'General Principles in International Law: Whose Principles?' (n 935) 33. See also Gaja (n 934) para 7 ff; Wolfgang Weiss, 'Allgemeine Rechtsgrundsätze des Völkerrechts' (2001) 39 Archiv des Völkerrechts 394, 397 ff. See also art. 21(1)(b) and (c) ICC Statute.

937 Besson, 'General Principles in International Law: Whose Principles?' (n 935) 33.

938 Crawford, *Brownlie's Principles of Public International Law* (n 906) 37.

939 Besson, 'General Principles in International Law: Whose Principles?' (n 935) 28. See also d'Aspremont, 'The Permanent Court of International Justice and Domestic Courts: A Variation in Roles' (n 240) 230 f.

940 Besson, 'General Principles in International Law: Whose Principles?' (n 935) 36 f; Jain (n 73). For an example, see Judge Bruno Simma's separate opinion in ICJ, case concerning *Oil Platforms* (*Iran v. United States*), judgment, merits, ICJ Reports 2003, 6 November 2003, 324, at 354, para 66 ff. I am grateful to León Castellanos-Jankiewicz for drawing my attention to this opinion.

decisions.[941] In general, however, the PCIJ and ICJ rarely apply general principles as a source of international law.[942] The ICTY has been cautious in using domestic case law to ascertain general principles of international law. In *Tadić*, it deemed reliance on 'national legislation and case law' justified only if 'most, if not all, countries adopt the same notion of common purpose'. The court added that 'it would be necessary to show that, in any case, the major legal systems of the world take the same approach' to the issue at stake.[943] Yet referring to so-called 'major legal systems' is problematic, as more weight is given to some States based on opaque criteria. As a matter of fact, Nollkaemper notes that the ICTY uses domestic case law selectively to identify general principles of international law.[944]

To conclude, domestic rulings help determine States' recognition of general principles of law. The weight of these rulings depends on how they fit with other domestic legislative and executive practices, analogously to what applies to CIL (*supra*, 3.1.2). The two-tiered test of State practice and *opinio juris* used for CIL does not need to be satisfied for general principles, which merely have to be 'general' and 'recognized' domestically.[945] This does not mean that such principles can be invoked to circumvent the two-tiered test of CIL.[946]

3.2 *Domestic Rulings as Auxiliary Means (Art. 38(1)(d) ICJ Statute)*

If in a given case, domestic rulings do not fulfill the criteria of subsequent treaty practice, State practice, and/or *opinio juris* in the context of CIL, or the domestic practice of recognition that generates some general principles of

941 PCIJ, case concerning the *Factory at Chorzów*, claim for indemnity, jurisdiction, PCIJ Series A No 9, 26 July 1927, 4, at 31, cited by Gaja (n 934) para 9.

942 d'Aspremont, 'The Permanent Court of International Justice and Domestic Courts: A Variation in Roles' (n 240) 230 f; Besson, 'General Principles in International Law – Whose Principles?' (n 935) 39; Sienho, 'Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases' (n 73) 488.

943 ICTY (Appeals Chamber), *Prosecutor v. Duško Tadić*, judgment, Case No IT-94-1-A, 15 July 1999, para 225. See also ICTY (Trial Chamber II), *Prosecutor v. Zoran Kupreškić and Others*, trial judgment, Case No IT-95-16-T, 14 January 2000, para 680; ICTY (Trial Chamber II), *Prosecutor v. Anto Furundžija*, judgment, Case No IT-95-17/1-T, 10 December 1998, para 177.

944 See, with reference to ICTY (Trial Chamber I), *Prosecutor v. Dražen Erdemović*, sentencing judgment, Case No IT-96-22-T, 29 November 1996, para 19: Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 289.

945 Besson, 'General Principles in International Law: Whose Principles?' (n 935) 60.

946 Pierre d'Argent, 'Les principes généraux à la Cour internationale de Justice' in Samantha Besson and Pascal Pichonnaz (eds), *Les principes en droit européen / Principles in European Law* (Schulthess 2011).

international law (*supra*, 3.1), domestic case law may still be used *qua* 'subsidiary means for the determination of rules of [international] law' (art. 38(1)(d) ICJ Statute).[947] I prefer to call them auxiliary means, for reasons I set out below. The use of domestic rulings *qua* auxiliary means pursuant to art. 38(1)(d) ICJ Statute by interpreters of international law stands on a different level than these rulings' contribution to the sources of international law of art. 38(1)(a)–(c) ICJ Statute (*supra*, 3.1).[948] While the difference is frequently blurred in practice,[949] distinctive tests apply in these two contexts.

The uncertainties surrounding art. 38(1)(d) ICJ Statute and, more generally, the place of judicial decisions in the sources of international law, reflect the *amour impossible*[950] between the orthodox doctrine of the sources of international law and the effect judicial decisions (both domestic and international) have in practice (*supra*, Chapter 1, 2.3).[951] Given the practical significance of judicial decisions in international law, scholarly analyses of art. 38(1)(d) ICJ Statute are surprisingly scarce.[952] International lawyers often mention the provision in passing, without analyzing the legal authority of domestic rulings.

International lawyers generally agree that 'subsidiary means' are conceptually distinct from the sources of international law listed in art. 38(1)(a)–(c) ICJ Statute.[953] On the other hand, judicial decisions are sometimes qualified as an 'indirect source'[954] or a 'subsidiary source'.[955] These expressions are

947 Nollkaemper notes that the ICTY has sometimes 'endowed national decisions with an apparent quasi-independent authority that cannot be reduced to a constituent element of either customary international law or a general principle of (international) law'. Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 290.

948 Besson and Ammann (n 60) 69 f.

949 Eg ibid 80.

950 Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' (n 85). The expression was originally used by Ascensio (n 85).

951 Antonio Cassese highlights this tension between the law in the books and the law in practice by referring to the 'wise' versus the 'wild approach' of international judges towards 'subsidiary means': Antonio Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals: Some Methodological Remarks' in Morten Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (Brill/Nijhoff 2003).

952 See however Aldo Zammit Borda, 'A Formal Approach to Article 38(1)(d) of the ICJ Statute From the Perspective of the International Criminal Courts and Tribunals' (2013) 24 European Journal of International Law 649; Zammit Borda (n 870).

953 See Zammit Borda (n 870) 68 f; Sienho (n 73) 491; Wolfrum (n 271) para 9.

954 Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law, Vol I: Peace* (9th edn, Longman 1996) 41.

955 La Forest (n 871) 98.

misleading: either something is a source of law, or it is not. 'Subsidiary means' are not sources, but material that assists decision-makers in ascertaining norms stemming from the sources of international law. The term 'subsidiary means' erroneously suggests a hierarchy or chronological priority between sources and 'subsidiary means',[956] instead of acknowledging that the latter help 'elucidate'[957] the former.[958] Because judicial decisions are auxiliary means, they cannot usurp the authority of the 'antecedent source' of the law they 'propound'.[959] As noted by the Asian-African Legal Consultative Organization (AALCO), they are 'no more than guideposts on the road to the destination, not the destination itself'.[960] In this regard, the French version of the ICJ Statute is more precise than the English one, as it refers to 'auxiliary' means, ie, to means that are 'offering or providing help'.[961] Hence, the term auxiliary means seems more appropriate (see also *supra*, Chapter 2, 5.4).[962]

While there are exceptions,[963] most international lawyers consider domestic rulings to fall under the 'subsidiary means' of art. 38.[964] This view is reflected in the ILC's draft conclusions on CIL.[965] It is supported by the fact that in the drafting process of the PCIJ Statute, the initial reference to international judicial decisions was changed to 'judicial decisions'.[966] Moreover, especially in the context of CIL, international courts[967] and arbitral

956 See Zammit Borda's statement that 'subsidiary means' should 'supplement' a given interpretation: Zammit Borda (n 870) 70.

957 Pellet and Müller (n 187) 944 para 305.

958 Crawford, *Brownlie's Principles of Public International Law* (n 906) 41; Wood (n 14) 12.

959 Jennings and Watts (n 954) 41.

960 Sienho Yee, 'Report on the ILC Project on "Identification of Customary International Law"' (2015) 14 Chinese Journal of International Law 375, 384.

961 See the definition of 'auxiliary' in <www.merriam-webster.com/dictionary/auxiliary>.

962 See also Pellet and Müller (n 187) 944 f para 306.

963 See ibid 953 para 323.

964 Hovell (n 871) 592; Jennings and Watts (n 954) 41 f; Higgins (n 365) 208. See also, for further references: Ammann, 'The Court of Justice of the European Union and the Interpretation of International Legal Norms: To Be or Not to Be a "Domestic" Court?' (n 140) 158, footnote 18.

965 Conclusion 13(2), ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

966 ILC Secretariat, 'Identification of Customary International Law: The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law' (n 185) 6 para 10; Zammit Borda (n 952) 652.

967 ILC Secretariat, 'Identification of Customary International Law: The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law' (n 185) 8 para 16.

tribunals[968] seem to use domestic rulings *qua* auxiliary means, even if they do not always explicitly say so.[969] As mentioned, it is often unclear in practice whether such rulings are cited based on art. 38(1)(d) ICJ Statute, or *qua* element of determination of international law.[970]

The word 'subsidiary', according to André Nollkaemper, 'reflects the fact that no formal system of precedents exists [in international law], let alone a principle of stare decisis'.[971] Absent such doctrines, however, interpreters are left with little guidance as to the weight of domestic rulings. Yet relying on domestic rulings in an erratic way stands in a tension with lawful, predictable, clear, and consistent judicial reasoning.[972] Domestic judicial decisions are not a convenient 'shortcut' or 'a "quick fix" solution'.[973] They are interpretative aids that should be used with 'intellectual discipline',[974] not based on convenience or result-oriented cherry-picking.

International lawyers explain that in practice, judicial decisions are usually relied on 'for their persuasive value'.[975] Alain Pellet and Daniel Müller for instance write:

> [P]recisely as 'there are awards and awards, some destined to become ever brighter beacons, others to flicker and die near-instant deaths', there are judgments and judgments. Central to the question is the persuasiveness of the legal reasoning.[976]

968 See ibid 7 para 13.

969 See ibid 16 ff para 28 ff. The ICTY too refers to domestic rulings *qua* auxiliary means, although it gives prefers to cite international rulings if they are available. See ibid 25 ff para 41 ff. The ICTR has occasionally used domestic rulings *qua* auxiliary means, see ibid 30 f para 47. On these two courts' 'wild approach' to auxiliary means, see Cassese (n 951) 21 ff.

970 Besson and Ammann (n 60) 80.

971 Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 291.

972 Aldo Zammit Borda rejects the use of domestic rulings as a 'direct souce', as they would be relied upon in a 'lax, uncritical' way: Zammit Borda (n 870) 66. See also Cassese 21.

973 See ibid 82.

974 Jennings uses this expression with regard to international rulings: Jennings (n 40) 10, 12.

975 Zammit Borda (n 870) para 7.

976 Pellet and Müller (n 187) 947 para 312. The authors are quoting Jan Paulsson, 'Report: International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics* (Kluwer Law International 2007) 881.

The notion of persuasive authority is frequently used in common law countries. Grant Lamond defines it as 'non-binding but legally relevant considerations'.[977] As Lamond explains, persuasive authority is a theoretical type of authority. It provides reasons to believe X, as opposed to reasons to do X, which is characteristic of practical authority.[978]

The notion of persuasiveness can be misleading. It can for example suggest that a decision is cited and followed in later cases simply because of its rhetorical force. Persuasiveness does not capture the fact that some judgments are cited in later cases (and hence have a legal effect beyond the particular case) because they are considered to offer lawful, high-quality reasoning. In this context, Samantha Besson's distinction between decisional and interpretive authority is helpful. According to Besson, judicial decisions have 'decisional authority' for the parties to the dispute, but also, in some cases, 'interpretive authority' by guiding future interpretations of the law.[979]

In relation to this issue, it is important to note that the question of other interpreters' (subjective) reliance on a given judgment (as authorized by art. 38(1)(d) ICJ Statute) is distinct from the question of the place of this judgment in the sources of international law (eg in international law, with respect to art. 38(1)(a)–(c) ICJ Statute, *supra*, 3.1). It also differs from the question of the (objective) legal authority of this ruling, be it vis-à-vis its addressees, in the legal order, or for a given court (*qua* precedent).

When should domestic rulings be used as auxiliary means pursuant to art. 38(1)(d) ICJ Statute? The answer partly follows from the two criteria I use to evaluate the practice of domestic courts (*supra*, Introduction, section 3). One criterion is courts' use of the interpretative methods of international law, as it indicates that a decision was made in conformity with what the law requires. A second one is the quality of the court's reasoning.[980] As mentioned, the

977 Grant Lamond, 'Persuasive Authority in the Law' (2010) 17 Harvard Review of Philosophy 16, 16.

978 See ibid 18. See also Joseph Raz, 'Normativity: The Place of Reasoning' (2015) 25 Philosophical Issues 144, 146.

979 Besson, 'The Erga Omnes Effect of Judgments of the European Court of Human Rights – What's in a Name?' (n 137); Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' (n 85) 420, 422. See also von Bogdandy and Venzke (n 174); van de Kerchove (n 799) 698.

980 ILC Secretariat, 'Identification of Customary International Law: The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law' (n 185) 34 para 56; ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891) 149 para 3. See also Christopher Greenwood, 'Unity

predictability, clarity, and consistency of judicial decisions are indicators of high-quality legal reasoning. They suggest – but do not guarantee – that the interpretation was not reached on a whim, but after a careful, thorough examination. Third, domestic case law that is not well established provides scant support for a given solution. In this context, the requirements of coherence, constancy, and generality of State practice in the context of CIL offer guidance. These requirements are not decisive, however, and may need to be relativized when the case law on a given issue is limited. Fourth, domestic rulings that have been quashed or contradicted by higher domestic courts carry little weight, even if the requirement of internal consistency applicable in the context of CIL does not strictly apply to auxiliary means. By contrast, the warrant of rulings that have withstood the test of higher judicial instances is stronger. Fifth, the domestic context of the judicial decision must be taken into account, including the court's jurisdiction, its composition, resources, and expertise (see also the criteria highlighted in Chapter 3, *supra*). These characteristics especially help determine whether the court's reasoning is generalizable. Sixth, *obiter dicta* arguably carry less weight than the *ratio decidendi*.

While the aforementioned criteria are not exhaustive and do not offer hard and fast rules on when domestic rulings provide conclusive auxiliary means, they provide guidelines for this assessment.

4 Conclusion

I have argued that domestic rulings on international law are central to international law in two main respects. First, domestic courts, through their interpretations, can enforce international law domestically and avert their State's international responsibility (*supra*, section 2). Second, they can (collectively) contribute to the formation and evolution of international law, and hence provide indications as to its content (*supra*, 3.1), and they can be used by interpreters of international law *qua* auxiliary means (*supra*, 3.2).

Since domestic rulings, besides having domestic legal authority (*supra*, Chapter 3, 4.2.7), are central to international law in these two respects, it is important to clarify the international legal frame that constrains domestic courts' interpretations. Part 3 of this study is devoted to this question, which overlaps with Raz's third question on interpretation, namely: how to interpret?

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and Diversity in International Law' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 51; Mendelson (n 73) 82; von Bogdandy and Venzke (n 174) 990 f.

PART 3

How to Interpret?

CHAPTER 5

The Need for Interpretative Methods in International Law

> Misuse of international law by national jurisdictions may have far-reaching negative consequences beyond the specific facts of the case over the long term. Such misuse as this promotes development of bad law, which runs the risk of being cited and adopted by other national jurisdictions.[981]

1 Introduction

In Parts 1 and 2, I have analyzed what interpretation is, and why domestic courts' interpretations are central to international law. I now move on to a third question: *how* must domestic courts interpret international law?

In the third part of this book, I argue that international law requires States to use specific methods to interpret these obligations, including via their courts, and that there are good reasons for imposing such a requirement on them. These reasons are primarily connected to the importance of lawful interpretation. However, they can also be linked to the virtues of predictable, clear, and consistent legal reasoning (*supra*, Introduction, section 3).

While the aforementioned claim may seem obvious and uncontroversial, States' duty to respect interpretative methods is often misunderstood, disregarded, or swept aside in practice and scholarship, as I will show. Many scholars (and even judges) express skepticism about interpretative methods. They argue that methods are vague and cannot constrain judges, that they are defined by the very actors whose powers they are supposed to harness, and that an emphasis on method neglects interpretative outcomes. In this chapter, I argue that such skepticism is unwarranted.

981 Weill (n 61) 67.

The chapter is structured as follows. First, I compare judicial interpretation to interpretation in other domains. This will help me show why legal interpretation in particular needs to be governed by specific methods (2). I also briefly retrace the development of interpretative methods in domestic and international law (3). I then provide arguments for having mandatory interpretative methods in domestic and international law (4), examine several objections that have been raised against interpretative methods (5), and conclude (6).

In this chapter, I do not yet examine the *specific* methods States and their courts must use. This issue is analyzed in Chapter 6 (*infra*). Nor do I examine whether methods are legitimate or morally justified all things considered. Still, the reasons I cite for requiring States and officials to respect the law's methods provide elements of such a theory of legitimacy.

2 Why Does the Law Need Interpretative Methods? a Comparison With Interpretation Outside the Law

(Dis)analogies between legal (and especially judicial) interpretation and other interpretative practices – eg the interpretation of religious texts, artworks, and social relationships – are frequently relied upon to conceptualize the interpretation of domestic law.[982] Such parallels have also been drawn regarding international law.[983] These comparisons are insightful. They can help us understand why constraining judicial interpretation through methods is so important.

Many analogies have been used in legal scholarship to highlight the ambivalence of judicial interpretation. It is an activity that is both constrained and free. On the one hand, legal (and especially judicial) interpretation is constrained, both legally and otherwise.[984] This diagnosis also applies to

982 Dworkin (n 77) 7; Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Harvard University Press 1980); Cover (n 208); von Savigny (n 761) 212; Pierre Moor, 'Dire le droit' (1997) 35 Revue européenne des sciences sociales 33; Bankowski and others (n 132) 12 f; Frankfurter (n 4); Barradas de Freitas (n 127).

983 Klabbers, 'Virtuous Interpretation' (n 93); Michael Waibel, 'Demystifying the Art of Interpretation' (2011) 22 European Journal of International Law 571. For a recent piece on the use of metaphors in international law in general, see Maks Del Mar, 'Metaphor in International Law: Language, Imagination and Normative Inquiry' (2017) 86 Nordic Journal of International Law 170.

984 'L'argumentation des juristes et ses contraintes (2)' (2012) 55 Droits; 'L'argumentation des juristes et ses contraintes (1)' (2011) 54 Droits; François Ost, 'L'interprétation des lois : un jeu sous contraintes' (2011) <www.philodroit.be/IMG/pdf/Ost.pdf>; Troper, Champeil-Desplats, and Grzegorczyk (n 80).

international law,[985] and it is shared by most legal scholars.[986] To emphasize legal (and other) constraints on interpretative freedom, the metaphor of the game (which, like the law, is a rule- [or, to put it more accurately, a norm-] governed activity) has attracted both domestic[987] and international legal theorists.[988] François Ost for instance argues that statutory interpretation is 'a game within constraints'.[989] Hart shows that most games are governed by predetermined rules, and that playing them is not equal to playing 'scorer's discretion'.[990] On the other hand, interpretation is also characterized by the freedom judges enjoy within the 'rules of the game'. Kelsen notes that 'the law to be applied constitutes only a frame within which several applications are possible, whereby every act is legal that stays within the frame'.[991] Methods are 'a frame without a picture'[992] that limits, but also empowers interpreters. In the international realm, the ILC has famously emphasized that treaty interpretation is 'to some extent an art, not an exact science'.[993]

Scholars have voiced concerns about hasty analogies between legal interpretation and interpretation outside the law[994] – and rightly so. Analogies risk obfuscating rather than facilitating analytical thinking. They can overlook what makes legal interpretation unique. The widespread use of analogies may be a sign that we struggle to understand legal interpretation. However, analogies are also useful to stimulate analytical thinking.[995] We can better understand

985 Bianchi, Peat, and Windsor (n 126).

986 Eg Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (n 75).

987 Eg Michel Troper, Véronique Champeil-Desplats, and Christophe Grzegorczyk, 'Introduction' in Michel Troper, Véronique Champeil-Desplats, and Christophe Grzegorczyk (eds), *Théorie des contraintes juridiques* (LGDJ/Bruylant 2005) 2 f.

988 Bianchi, Peat, and Windsor (n 126); Lorenzo Gradoni, 'The International Court of Justice and the International Customary Law Game of Cards' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015); Emer de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (Librairie de Guillaumin et Cie 1863) 465. For a critique, see Odile Ammann, 'International Legal Interpretation as a Game: A Compelling Analogy?' (2016) Harvard International Law Journal (online edition).

989 Ost (n 983).

990 Hart (n 78) 142.

991 Hans Kelsen, *The Pure Theory of Law* (University of California Press 1967) 351.

992 Frederick Schauer, 'The Dilemma of Ignorance: PGA Tour, Inc. v Casey Martin' (2001) 2001 Supreme Court Review 267, 267.

993 ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 218.

994 Eg Richard A Posner, *Law and Literature: A Misunderstood Relation* (Harvard University Press 1988); Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* (Southern Illinois University Press 1992). See also Jan Klabbers, 'International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?' (2003) 50 Netherlands International Law Review 267, 272.

995 Shapiro (n 196) 19.

judicial interpretation, and why it needs to be governed by methods, by carefully comparing (2.1) and contrasting it (2.2) with interpretation outside legal practice.

2.1 *Similarities*

Legal (and especially judicial) interpretation and the interpretation of other objects than laws share four main similarities: (i) they are constrained by context, (ii) they are governed by idiosyncratic methods, (iii) they leave room for different interpretative results, and finally, (iv) they are accompanied by reasons stating why a given interpretation is correct.

First, interpretation does not occur in a vacuum, but is constrained by context. Ludwig Wittgenstein has famously pointed out that 'meaning is use', and that it hinges on the canons that a practice generates. Susan Sontag notes that photographers are 'haunted by tacit imperatives of taste and conscience'.[996] This applies to interpretation in the arts more generally.[997] In the legal realm, the legal norms that require courts to use specific methods are secondary norms and therefore, before anything else, customary norms (on the Hartian notion of secondary norms, see *infra*, 3.2). Moreover, what constitutes high-quality judicial reasoning is defined by legal practice, besides being a corollary of the legal and moral principle of the rule of law (see also *supra*, Introduction, section 3).[998]

Secondly, different interpretative domains have different idiosyncratic methods. A method is 'a systematic procedure, technique, or mode of inquiry *employed by or proper to a particular discipline or art*' (emphasis added).[999] Methods are ways through which the interpreter can achieve good results by the standards of this interpretative practice, even if this does not rule out legitimate disagreement about how the object must be interpreted. Early treatises of general hermeneutics, for instance, intended to help interpreters exclude 'wrong' meanings and select 'true' ones.[1000] In international law, Hugo Grotius

996 Susan Sontag, *On Photography* (Picador 1977) 6.

997 Eg Kendall L Walton, *Marvelous Images: On Values and the Arts* (Oxford University Press 2008) 204 f.

998 Michael Klarman argues that 'the principal constraints on constitutional interpretation derive from social and political context, not from constitutional text or tradition', see Klarman (n 831) 1742. François Gény writes that 'we [lawyers] are dominated, without our knowledge, by authority and tradition, and, if I may say so, by this professional heredity, which envelops and embraces us like some sort of shirt of Nessus'. See François Gény, *Méthode d'interprétation et sources en droit privé positif* (2nd edn, LGDJ 1919) 51.

999 <www.merriam-webster.com/dictionary/method>.

1000 Bjørn Ramberg and Kristin Gjesdal, 'Hermeneutics', *Stanford Encyclopedia of Philosophy* (2005) <plato.stanford.edu/entries/hermeneutics>.

and his followers considered methods necessary to solve disputes and to determine the true meaning of international law.[1001]

Thirdly, even within a given context, there are typically different ways to interpret an object while remaining within the constraints defined by the context. One method (eg textual interpretation) may be applied differently by different interpreters, with different results. Moreover, there are often various ways of choosing among the results yielded by different methods to determine the meaning of the interpretative object. Even within a given 'interpretive community',[1002] there can be various good conceptions of what a good interpretation is[1003] and, therefore, different incompatible, yet good interpretations of a given object.[1004] Of course, methodological disagreement does not necessarily yield incompatible interpretations, and *vice versa*. Disputes about interpretative methods already divided the Roman jurists,[1005] and methods have also been 'the subject of acute debate and controversy' in international law.[1006] While these divergences hinge on deeper disagreements about issues of moral philosophy, they primarily express themselves via methodological feuds.[1007] It is important to emphasize that there may be (i) 'interpretations' that are not actually interpretations, even if they are presented as such, and (ii) bad interpretations. Thus, not every disagreement is a legitimate one, unless it involves incompatible, yet good interpretations.

1001 David J Bederman, 'Grotius and His Followers on Treaty Construction' (2001) 3 Journal of the History of International Law 18, 22.

1002 According to Stanley Fish, an interpretive community is formed by 'those who share interpretive strategies not for reading but for writing texts, for constituting their properties'. See Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (n 982) 5.

1003 Raz, 'Normativity: The Place of Reasoning' (n 978) 146. See also Sontag (n 996) 115 f; 173 f; Monroe C Beardsley and William K Wimsatt, 'The Intentional Fallacy' in Joseph Margolis (ed), *Philosophy Looks at the Arts* (3rd edn, Temple University Press 1987).

1004 Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 78) 231.

1005 This is illustrated by the antagonism between the Sabinians (who endorsed an early form of formalism) and the Proculians (whose conception of legal interpretation was more pragmatic). See Peter Stein, 'Interpretation and Legal Reasoning in Roman Law' (1995) 70 Chicago-Kent Law Review 1539, 1544 f.

1006 Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Treaty Interpretation and Other Treaty Points' (1957) 33 British Yearbook of International Law 203, 204. See also (regarding CIL) Petersen (n 73) 6 ff.

1007 Sunstein, 'There Is Nothing That Interpretation Just Is' (n 207); Robert Post, 'Theories of Constitutional Interpretation' (1990) 30 Representations 13.

Lastly, the merits of an interpretation cannot be evaluated unless the interpretation is accompanied by reasons explaining why this interpretation is correct.[1008]

2.2 *Differences*

Three differences between legal (and more specifically judicial) interpretation and interpretation outside the law explain why interpretative methods and predictable, clear, and consistent reasoning are particularly important in judicial decision-making. These differences concern (i) the respective stakes of these activities, (ii) the authority of judicial interpretation, and (iii) judges' duty to settle disputes.

First, the stakes of judicial interpretation differ from those of interpretation in other domains. As Robert Cover notes, 'legal interpretation takes place in a field of pain and death'.[1009] Laws regulate virtually every aspect of human life,[1010] and domestic rulings can have implications for the entire legal order. They often settle controversial moral issues, and they can have far-reaching implications for the law's subjects, eg in terms of social security, economic policy, or fundamental rights. This explains why constitutional interpretation has been a central preoccupation in legal theory. Interpretation outside the law, by contrast, does not play a comparable part in structuring the life of a society.

Second, judicial interpretations are legally authoritative for the parties to the dispute (and, in some jurisdictions, beyond the particular case). They aim at guiding the behavior of their subjects, and they exclude other reasons to act that these subjects might have. In non-legal domains, interpretations do not share this preemptive, exclusionary normative force. In the arts, interpreters claim that their interpretations are valid, but they can merely strive (if at all) to 'woo the consent of everyone else'.[1011]

Third, judges are dispute settlers. We disagree about the meaning of plays, books, paintings, and the law. Yet in the latter case, 'a common basis for action

1008 Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 78) 230. See also Timothy Endicott, 'Interpretation and Indeterminacy: Comments on Andrei Marmor's Philosophy of Law' (2014) 10 Jerusalem Review of Legal Studies 46.

1009 Robert M Cover, 'Violence and the Word' (1986) 95 Yale Law Journal 1601.

1010 Barradas de Freitas (n 127) 46.

1011 This expression is used by Hannah Arendt, 'The Crisis in Culture: Its Social and Its Political Significance', *Between Past and Future: Eight Exercises in Political Thought* (Penguin Books 2006) 222; David Luban, 'Arendt at Jerusalem' (2015) 30. See Immanuel Kant, *Kant's Critique of Judgment, Translated With Introduction and Notes by J. H. Bernard* (2nd edn, Macmillan 1914) 92, § 19.

has to be forged in the heat of our disagreements'.[1012] Granted, outside the law, interpretive communities rely on epistemic authorities to ascertain the meaning of interpretative objects. Hume for instance deemed experts the 'real judges' of an artwork's aesthetic quality.[1013] Yet expert opinions do not cordon off other interpretations, as judicial interpretations do.

Due to the high stakes, legal authority, and finality of judicial interpretation, judges yield tremendous institutional power. This explains why domestic and international law seek to harness this power through interpretative norms.

3 The Origins of Interpretative Methods in Domestic and International Law

In this book, I argue that States and their courts must respect the interpretative methods of international law, and that they should meet the standards of good (high-quality) legal reasoning. When making such an argument, it seems essential to have at least a basic understanding of how interpretative methods have developed in domestic and international law, and of the relationship between the respective methods of these two bodies of law. It is important to clarify at the outset that a comprehensive historical account is beyond the scope of this chapter. Excellent research already exists on this topic.[1014] My goal is merely to show that interpretative methods are nothing new. They pervade legal practice. This account will be particularly helpful when analyzing arguments in favor of, and criticisms raised against, interpretative methods (*infra*, sections 4–5). As mentioned, I do not yet examine specific methods. I address this issue in Chapter 6 (*infra*).

How did legal norms prescribing the use of interpretative methods emerge? As Samantha Besson writes, 'one might reasonably suppose that many of the questions of legal philosophy are best approached in the first instance via their application to municipal state legal systems, which are both more familiar and more highly developed, before advancing to their international

1012 Waldron, 'The Core of the Case Against Judicial Review' (n 746) 1370. See also Hart's observation that uncertainty in particular cases makes primary norms inefficient: Hart (n 78) 93.

1013 David Hume, 'Of the Standard of Taste' in Charles W Eliot (ed), *English Essays: From Sir Philip Sidney to Macaulay – The Harvard Classics, Vol 27* (Collier 1910).

1014 For a historical analysis of interpretative methods in domestic law, see Benoît Frydman, *Le sens des lois : Histoire de l'interprétation et de la raison juridique* (Bruylant 2005). For international law, see David J Bederman, *Classical Canons: Rhetoric, Classicism and Treaty Interpretation* (*Applied Legal Philosophy*) (Ashgate 2001).

counterparts'.[1015] I hence examine the aforementioned issue for both domestic (3.1) and international law (3.2). I also clarify the relationship between interpretative methods in domestic and international law (3.3).

3.1 *Domestic Law*

Domestic interpretative methods have existed for centuries, and scholarship on how to interpret domestic laws – a traditional question of legal theory and philosophy – is prolific. In continental Europe, the first scholarly efforts to spell out the 'methods' of domestic legal interpretation date back to the 19th century. These efforts were based on the conception of law as a 'science', with a methodology of its own right.[1016] Savigny's 'four elements' doctrine,[1017] which is at the root of the methods Swiss and other domestic courts[1018] use to interpret domestic laws (including in common law countries),[1019] builds upon the understanding of law as a scientific endeavor ('Rechtswissenschaft').[1020] While this conception is less compelling today, it still surfaces in contemporary scholarship.[1021] Savigny's four methods aim at helping the interpreter ascertain domestic laws.[1022] François Gény, in his early 20th-century analysis of the interpretation of French private law, notes that these 'traditional'[1023] methods developed alongside processes of codification.[1024] Many of them ensure judicial accountability towards the legislature. Calls for a renewal of legal and judicial methods increased after

1015 Samantha Besson, 'Moral Philosophy and International Law' in Florian Hoffmann and Anne Orford (eds), *The Oxford Handbook of International Legal Theory* (Oxford University Press 2016) 387. International law and domestic constitutional law, in particular, share more features than is often assumed: Jack L Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 Harvard Law Review 1791. HLA Hart even considered that a 'range of principles, concepts, and methods which are common to both municipal and international law, [...] make the lawyers' technique freely transferable from the one to the other'. Hart (n 78) 237.

1016 Gény (n 998); Frydman (n 1014) 20.

1017 von Savigny (n 761) 212 ff.

1018 Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013).

1019 *The Interpretation of Statutes* (n 54) 12.

1020 von Savigny (n 761) 206 ff. See also Friedrich Karl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (3rd edn, JCB Mohr 1840).

1021 Ernst Kramer, 'Konvergenz und Internationalisierung der juristischen Methode' in Académie des privatistes européens (ed), *A l'Europe du troisième millénaire : Mélanges offerts à Giuseppe Gandolfi à l'occasion du dixième anniversaire de la fondation de l'Académie* (Giuffrè 2014) 167.

1022 von Savigny (n 761) 207.

1023 For a critique of this characterization: Frydman (n 1014) 17.

1024 Gény (n 998) 23. See also Waibel, 'Principles of Treaty Interpretation: Developed for and Applied by National Courts?' (n 183) 26 f.

the traumatic experience of Nazi and communist dictatorships[1025] and their 'dreadful jurists'.[1026]

In the United States, methods of legal (and especially constitutional) interpretation are deemed means for 'domesticating the judges' personal preferences'.[1027] These methods were developed by the courts which, especially in the years that followed their creation, had to secure their institutional legitimacy. After some bold yet widely acclaimed decisions of the Warren Court,[1028] many jurists felt the urge to demonstrate that such rulings were 'law, not just politics',[1029] ie, that they were in accordance with the law and based on predictable, clear, and consistent judicial reasoning. US lawyers associate the requirement to follow interpretative methods with courts' duty to protect the rule of law,[1030] 'to say what the law is'.[1031] Some methods are acceptable, while others 'are not part of [US] legal grammar'.[1032] Robert Summers and Neil MacCormick list eleven 'argument types'[1033] that courts in the United States and elsewhere use in statutory interpretation. These argument types fall into four categories: linguistic, systemic, teleological/evaluative, and 'transcategorical' (or 'argument from intention').[1034] In England as well, methods of statutory interpretation are judge-made.[1035]

This short account suggests that interpretative methods are part of domestic legal practice. They are used as guides by officials[1036] and by those who evaluate their practice.[1037]

1025 Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' (1946) 1 Süddeutsche Juristenzeitung 105.

1026 Peter Gauch, 'Juristisches Denken. Wie denken Juristen?' in Heinrich Honsell and others (eds), *Privatrecht und Methode: Festschrift für Ernst A. Kramer* (Helbing & Lichtenhahn 2004) 179 f.

1027 Tushnet (n 777) 50.

1028 *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

1029 Owen M Fiss, 'Objectivity and Interpretation' (1982) 34 Stanford Law Review 739, 741.

1030 Brewer (n 213).

1031 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), at 177.

1032 Bobbitt (n 171) 6.

1033 This meaning of the word 'argument type' differs from the one used in Chapter 2, 5.5 (*supra*).

1034 D Neil MacCormick and Robert S Summers, 'Interpretation and Justification' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (Aldershot 1991).

1035 *The Interpretation of Statutes* (n 54) 14.

1036 Michael J Klarman, 'Bush v. Gore Through the Lens of Constitutional History' (2001) 89 California Law Review 1721, 1723.

1037 Tushnet (n 777) 50.

3.2 *International Law*

A seminal contribution to the understanding of interpretative methods is Hart's account of law as a union of primary and secondary norms.[1038] In this formulation, primary norms are directed towards legal subjects and create rights and obligations. Secondary norms are customary norms that 'are all concerned with the primary rules themselves'[1039]: they clarify how primary norms are created, changed, and interpreted,[1040] and they are addressed to legal officials. According to Hart, secondary norms, unlike primary norms, are not rights-conferring or duty-imposing, but 'power-conferring' norms. Yet Hart neglects that duty-imposing secondary norms do exist.[1041] Norms that prescribe the use of specific interpretative methods do not merely confer powers: they constrain legal officials, even if these officials retain some degree of interpretative freedom.

Importantly for our purposes, Hart argued that international law lacked secondary norms.[1042] Since secondary norms include norms about interpretative methods, and since Hart's position was that international law was not a system but a 'set of rules', his scholarship probably reinforced many in the idea that international law was defective compared to domestic law.[1043]

It is true that the VCLT's methods of treaty interpretation are the result of a 'difficult gestation process', and that the lack of a systematic, consistent international practice on the issue rendered their codification controversial.[1044] The ILC has codified some methods (eg, most recently, the methods for identifying customary law),[1045] and in 2015, the ILA set up a 'Study Group on the

1038 Hart (n 78) ch VI. While Hart refers to 'rules', the umbrella term of 'norms' seems more accurate, as norms governing judicial interpretation include principles (Chapter 2, 5.2 and 5.3, *supra*). The union of primary and secondary norms constitutes a legal system, as opposed to a set of rules lacking common criteria of validity and modification, ibid 94.

1039 See Hart (n 78) 94.

1040 Eg Thomas M Franck, 'Legitimacy in the International System' (1988) 82 American Journal of International Law 705, 751–752; Axel Marschik, 'Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System' (1998) 9 European Journal of International Law 212, 212.

1041 I am grateful to Timothy Endicott for bringing this point to my attention.

1042 Hart (n 78) 214.

1043 Mehrhad Payandeh, 'The Concept of International Law' (2010) 21 European Journal of International Law 967.

1044 Jean-Marc Sorel and Valérie Boré-Eveno, 'Article 31' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary, Vol I* (Oxford University Press 2011) 806 f.

1045 ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

Content and Evolution of the Rules of Interpretation'.[1046] Yet international law does have (and has always had) secondary norms,[1047] an obvious example being the century-old norm *pacta sunt servanda*.

Granted, State practice pertaining to the formation and amendment of international law is scarce, barely detailed, and often inconsistent,[1048] as is the practice of international courts,[1049] but such difficulties also exist in domestic law. States (and their courts)[1050] and international judges[1051] do rely on textual, historical, systematic, and teleological interpretation, even if the use of these methods does not always satisfy the virtues of predictability, clarity, and consistency. International rulings are evaluated based on their interpretative methods, and methodological 'laxness' is frowned upon.[1052] The ICJ for instance has been criticized for its 'delphic' methodology.[1053] Similar benchmarks are applied to the practice of other international courts,[1054] regional courts,[1055] to States and domestic rulings,[1056] and even to non-state actors.[1057]

1046 ILA, 'Preliminary Report of the ILA Study Group on the Content and Evolution of the Rules of Interpretation' (n 231).

1047 Murphy (n 84) 154 f; Waldron, 'International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?' (n 79).

1048 Gradoni (n 988) 383 f.

1049 See ibid 394 ff.

1050 *Bond v. United States*, 572 U.S. 844 (2014) (treaty law); BGE 138 II 524, at 3 and 4 (treaty law); BGE 132 III 661, at 4.4 (CIL).

1051 Malgosia Fitzmaurice, 'The History of Article 38 of the Statute of the International Court of Justice: The Journey From the Past to the Present' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 19 f.

1052 Zammit Borda (n 870) 66; Talmon (n 73).

1053 Sienho (n 73) 480. The expression was originally used by Mendelson (n 73) 67, 72.

1054 Marc Schack and Astrid Kjeldgaard-Pedersen, 'Striking the Balance Between Custom and Justice: Creative Legal Reasoning by International Criminal Courts' (2016) 16 International Criminal Law Review 913.

1055 On the ECtHR: Letsas (n 79). On the IACtHR: Lukas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 European Journal of International Law 585. On the CJEU: Odermatt (n 140); Kuijper (n 179).

1056 Andrea Bianchi, 'Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights' in Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Brill/Nijhoff 1997) 405, 407; Aust and Nolte (n 47); Aust, Rodiles, and Staubach (n 140); Iovane (n 182).

1057 On the ICRC and UNHCR, respectively, see John B Bellinger and William J Haynes, 'A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law' (2007) 89 International Review of the Red Cross 443; Bailliet (n 15).

Long before the adoption of the VCLT, international lawyers used to emphasize the importance of States being methodical in their interpretations.[1058] Hugo Grotius considered that methods were necessary to provide guidance to interpreters in finding the proper meaning of treaties. Like the ancient Greeks, on whose work he relied,[1059] he thought that methods would reduce the likelihood that States would interpret agreements in a 'sophistic' way.[1060] These rationales were subsequently endorsed by scholars such as Samuel Pufendorf,[1061] Christian Wolff,[1062] and Emer de Vattel.[1063] All of them (perhaps somewhat unrealistically) believed that treaty interpretation ought to be governed by 'definite', 'precise' 'rules'.

In the late 19th and early 20th century, international lawyers still emphasized interpretative methods, but the rationales had changed. The 19th century heralded the increasing dominance of legal positivism. Instead of focusing on good faith and other principles of justice, legal positivists emphasized procedure and methodology, and they endeavored to develop the law's scientific credentials.[1064] Although more convincing reasons for requiring States to respect interpretative methods have gained traction since (*infra*, section 4), this scientism has not entirely disappeared.[1065]

1058 On the 'distant origins' of the VCLT's interpretative principles, see Alain Pellet, 'Canons of Interpretation Under the Vienna Convention' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2018).

1059 It is worth noting that some rules of logic (such as *ejusdem generis* and *generalia specialibus non derogant*) can be traced back to Roman law. See Michael Waibel, 'The Origins of Interpretive Canons in Domestic Legal Systems' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2018) 27.

1060 Bederman (n 1001) 25. See also ibid 34.

1061 Pufendorf (n 177) 793 f.

1062 Christian Wolff, *Jus gentium methodo scientifica pertractatum* (Clarendon Press/H Milford 1934) 194.

1063 de Vattel (n 988) 461.

1064 Martti Koskenniemi, 'The Politics of International Law' (1990) 1 European Journal of International Law 4, 6; Jochen von Bernstorff, 'German Intellectual Historical Origins of International Legal Positivism' in Jean d'Aspremont and Jörg Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014). See also Anne Orford, 'Scientific Reason and the Discipline of International Law' (2014) 25 European Journal of International Law 369; Gradoni (n 988) 387 ff.

1065 ILC, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Fragmentation of International Law' (n 296).

In 1949, Hersch Lauterpacht recommended that the ILC include the law of treaties 'within the orbit of codification'[1066] of international law. Codification, in his opinion, would systematize the methods of treaty interpretation. He considered that treaty interpretation was 'overgrown with the weed of technical rules of construction which can be used – and are frequently used – in support of opposing contentions'.[1067] Lauterpacht combined natural lawyers' emphasis on good faith and the need to constrain State discretion with the legal positivists' concern to derive such constraints from State practice.[1068] The work of the other Special Rapporteurs on the law of treaties (especially Gerald Fitzmaurice[1069] and Humphrey Waldock)[1070] confirms that interpretative methods were deemed valuable, and that they were reflected in international legal practice at the time. The ILC's work led to the adoption of the VCLT, which includes three provisions on treaty interpretation.[1071] The Convention's approach to interpretation, based on which different interpretative arguments are 'thrown into the crucible',[1072] preserves flexibility, thereby responding to States' concerns.[1073] At the same time, it clarifies the principles of treaty interpretation, and hence defines interpretative constraints.

As is the case with treaty law, State practice shows that CIL too is ascertained based on interpretative canons, even if this practice can be criticized

1066 Hersch Lauterpacht, 'Survey of International Law in Relation to the Work of Codification of the International Law Commission, Memorandum Submitted by the Secretary-General of the United Nations' (1949) 52.

1067 See ibid.

1068 Legal positivists such as Lassa Oppenheim emphasized that interpretative methods were to be derived from the practice of States (as opposed to principles of natural law), although they also thought that such methods were valuable and 'enable[d] a universally recognized construction of the treaties concerned'. See Lassa Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 American Journal of International Law 313, 350.

1069 ILC, 'Second Report on the Law of Treaties by Mr. G. G. Fitzmaurice, Special Rapporteur' (1957) UN Doc A/CN.4/107; ILC, 'Fourth Report on the Law of Treaties by Mr. G. G. Fitzmaurice, Special Rapporteur' (1959) UN Doc A/CN.4/120; Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Treaty Interpretation and Other Treaty Points' (n 1006) 210–212.

1070 ILC, 'Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' (1964) UN Doc A/CN.4/167 and Add. 1–3 54.

1071 Art. 31–33 VCLT.

1072 ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 220.

1073 ILC, 'Sixth Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur' (1966) UN Doc A/CN.4/186 and Add. 1, 2/Rev. 1, 3–7 94.

for being scarce and evasive.[1074] The decisions of international courts (again, as imperfect as they are)[1075] also contain references to such canons.[1076] In 2012, the topic of the 'formation and evidence of customary international law', subsequently changed to 'identification of customary international law', was added to the ILC's agenda.[1077] The ILC's work, which was completed in 2018,[1078] provides insights into the concerns that interpretative methods are expected to address in international law. It follows on from previous efforts to clarify these methods.[1079] Starting from the assumption that those who apply CIL need an understanding of the process by which custom is created, the ILC's goal is, similar to the goals of previous ILC projects,[1080] 'to produce authoritative guidance for those called upon to identify customary international law, including national and international judges'.[1081] On the other hand, the Commission cautions against being 'overly prescriptive', and it does not expect to come up with 'hard-and-fast rules' of identification.[1082] It therefore seeks to find a middle ground between freedom and constraint.[1083]

No comparable project of codification exists with regard to general principles of international law, which makes it difficult to inquire into the origins of the canons governing their identification. However, as I will show, such canons apply to general principles as well (*infra*, Chapter 6 and Chapter 8, section 3).

1074 August Reinisch and Peter Bachmayer, 'Customary International Law in Austrian Courts' (2013) <papers.ssrn.com/sol3/papers.cfm?abstract_id=2289788>; Besson and Ammann (n 60).

1075 Gradoni (n 988) 394 ff; Talmon (n 73).

1076 ICJ, *Jurisdictional Immunities of the State* (*Germany v. Italy; Greece intervening*), judgment, ICJ Reports 2012, 3 February 2012, 99, at 122 ff, para 54 ff.

1077 For an overview, see <legal.un.org/ilc/guide/1_13.shtml>.

1078 ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891). For a diachronic account of the doctrine of CIL, see Jean d'Aspremont, 'The Four Lives of Customary International Law' (2019) 21 International Community Law Review 229.

1079 Eg ILA Committee on Formation of Customary (General) International Law (n 886).

1080 See ibid 4.

1081 ILC, 'Recommendation of the ILC Working-Group on the Long-Term Programme of Work, Annex A: Formation and Evidence of Customary International Law (Mr. Michael Wood)' (2011) UN Doc A/66/10, 305, para 4. See also ILC, 'First Report on Formation and Evidence of Customary International Law by Special Rapporteur Sir Michael Wood' (n 185) 6, para 14.

1082 See ILC, 'First Report on Formation and Evidence of Customary International Law by Special Rapporteur Sir Michael Wood' (n 185) 7, para 18.

1083 ILC, 'Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (n 294) 2, para 4.

To conclude, and as is the case with domestic law (*supra*, 3.1), interpretative methods are reflected in the practice of international law. This practice originally developed them and has sought (and is still seeking) to systematize them. Some norms prescribing the use of methods have been (or are being) codified. Codification increases the predictability, clarity, and consistency of interpretation in international law, while preserving States' interpretative freedom. States, the primary interpreters of international law, refer to such methods and seek to demonstrate that they are guided by them. Interpretative methods are also used by scholars and practitioners to evaluate specific interpretations.

3.3 *The Relationship between the Interpretative Methods of Domestic and International Law*

As emerges from the previous subsections (*supra*, 3.1 and 3.2), interpretative methods guide the practice of both domestic and international law. To slightly adjust Matthias Goldmann's conclusion regarding the sources of the law, 'thinking in terms of sources'[1084] *and methods* is not peculiar to either domestic or international law: both do. Importantly, and unlike what is often assumed, there is no fundamental difference between interpretative methods in domestic and international law,[1085] as I will show in more detail (*infra*, Chapter 6). The basic methods prescribed by the VCLT, for instance, are the same as those that govern statutory and constitutional[1086] interpretation (ie, textual interpretation, systemic interpretation, teleological interpretation, and historical interpretation).[1087] Nor do interpretative methods fundamentally

1084 Matthias Goldmann, 'Sources in the Meta-Theory of International Law: Exploring the Hermeneutics, Authority, and Publicness of International Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 5.

1085 See also BGE 130 I 312, at 4.1; BGE 135 V 339, at 5.3, and 'Appendix 7. The Interpretation of Treaties, Seventh International Conference of American States, 1933' (1935) 29 American Journal of International Law 1225. *Contra* André Nollkaemper, 'Grounds for the Application of International Rules of Interpretation in National Courts' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016).

1086 Curtis Bradley and Jack Goldsmith, in their textbook on US foreign relations law, list the methods of constitutional interpretation that are 'most relevant to foreign relations law', ie, originalism, burkeanism/historical gloss, structuralism, prudentialism, and *stare decisis*. See Bradley and Goldsmith (n 171) 40.

1087 In its commentary of the VCLT, the ILC notes that 'statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of statutes and contracts'. See ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 218.

vary from one domestic legal order to the other.[1088] What varies is mainly the interpretative object and its characteristics, which must be taken into account in the interpretative process.

4 Three Reasons for Requiring States to Use Interpretative Methods

The use of, and value attached to, interpretative methods is reflected in domestic and international law (*supra*, section 3). But what is the *rationale* for requiring States (including courts) to use specific methods when interpreting the law?

In this section, I mention three compelling reasons why it is necessary to harness the judiciary through interpretative methods (and, one might add, for requiring it to strive to achieve predictability, clarity, and consistency in its reasoning). These reasons pertain to the frequent vagueness of laws (4.1), to the 'counter-majoritarian difficulty' created by judicial review (4.2), and to courts' interpretative power (4.3). These arguments apply (with slight adjustments) to domestic *and* international law.

By using words such as 'rationale', 'reasons', or 'arguments', I am not evaluating the legitimacy or moral justification of legal norms that prescribe interpretative methods.[1089] Instead, my aim is to show that there are weighty (empirical, but also legal) reasons for legally requiring States and their courts to use specific methods to interpret domestic and international law, independently from the moral justification of such a legal requirement. However, the reasons I cite in this section provide elements for such a theory of legitimacy.

4.1 *Vagueness*

4.1.1 Domestic Law

One compelling reason why domestic courts must resort to methods to decide cases is that domestic law is often vague when applied to particular issues. Hart famously stated that the law is open textured,[1090] and that it inevitably becomes indeterminate in practice.[1091] As Timothy Endicott writes, vagueness

1088 MacCormick and Summers (n 1034). On the domestic origins of international interpretative norms (especially rules of logic), see Waibel, 'The Origins of Interpretive Canons in Domestic Legal Systems' (n 1059).

1089 On the methodology of the present study, see *supra*, Introduction, sections 2 and 3.

1090 Hart borrowed this expression from Waismann; see Waismann (n 153) 123.

1091 Hart (n 78) 124 ff.

is no pathology, but a feature of the law.[1092] Vagueness in law is not only a symptom of linguistic indeterminacy.[1093] It is, as Scott Brewer notes, 'relative to term, language user(s), time of application of term, and "application group" (the set of objects to which the term might be applied)'.[1094]

Domestic constitutions, in particular, are frequently vague. First of all, they are drafted at a high level of generality, since they aim at setting out the basic norms of a given polity without reaching 'the prolixity of a legal code'.[1095] Second, as Michael Klarman observes, 'the debate over permissible sources of [constitutional] interpretation is [...] inconclusive'.[1096] Third, constitutions are usually difficult to amend. This can create gaps between their text and contemporary circumstances, gaps which judges may feel compelled to fill through interpretation.

Vagueness, as Timothy Endicott notes, means that 'judicial decisionmaking will in some cases be unconstrained by the law'.[1097] This should not surprise us, as every domestic polity, in establishing judicial review, accepts at least implicitly that judges will make choices when applying the law. Few would argue that adjudication is value-free, or that the judge is a 'subsumption automaton'.[1098] Georg Friedrich Puchta's and Bernhard Windscheid's 'Begriffsjurisprudenz' and the French 'école de l'exégèse' have fallen out of favor, at least in their extreme (and often exaggerated) readings. Endorsing what Hart called conceptualism, which consists in denying the existence of interpretative latitude,[1099] may be tempting for courts wary of securing the social acceptance of their rulings. Yet conceptualism is counter-factual, as it ignores the choices and creativity that characterize judicial decision-making. Worse, it allows courts to hide these choices behind an alleged 'clarity' of the law. If vagueness is negated, courts are less accountable to the polity that has granted them their adjudicatory power.

Does the fact that vagueness cannot be eliminated from the law (and that judges are hence rarely fully constrained) mean that the rule of law is unattainable?[1100] Vagueness, Endicott explains, is not necessarily 'a deficit' in

1092 Endicott (n 80) 1.
1093 See ibid 5; Brian Bix, *Law, Language, and Legal Determinacy* (Clarendon Press 1993).
1094 Brewer (n 213) 993.
1095 *McCulloch v. Maryland*, 17 U.S. 316 (1819), at 407.
1096 Klarman (n 1036) 1724.
1097 Endicott (n 80) 4.
1098 Regina Ogorek, *Aufklärung über Justiz: Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert* (2nd edn, Vittorio Klostermann 2008). See also Frankfurter (n 4) 541.
1099 Hart (n 78) 129.
1100 On this issue, see Timothy Endicott, 'The Impossibility of the Rule of Law', *Vagueness in Law* (Oxford University Press 2000).

the rule of law. However, it can become one 'when it enables authorities to exempt their actions from the reason of the law, or when it makes it impossible to conceive of the law as having any reason distinguishable from the will of the officials'.[1101] Hence, if judges can demonstrate that their decisions are guided by the interpretative methods the law requires them to use, they are better equipped to rebut such charges.

4.1.2 International Law

As mentioned (4.1.1, *supra*), vagueness has several different causes. The magnitude of these causes is arguably even greater in international law. This increases the discretion of its interpreters.

First, international law is often vague because the sources from which it stems, and the characteristics of these sources, leave room for indeterminacy.[1102] There can be uncertainty as to whether an 'agreement' qualifies as a 'treaty' under the VCLT, for instance.[1103] The ascertainment of unwritten law is even less determinate, given the absence of a textual interpretative basis and given the scarce guidance provided by art. 38 ICJ Statute. State practice is difficult to access[1104] and to review comprehensively. Moreover, the sources of international law are not hierarchical,[1105] which leaves interpreters with little guidance when norms originating from distinct sources clash.

Second, the fact that States often differ in their legal structure, political organization, socio-cultural characteristics, interests, and policies increases the likelihood of interpretative divergence.[1106] Of course, diversity does not necessarily generate disagreement. Still, Philip Allott has observed that a treaty is 'a disagreement reduced to writing',[1107] and Detlev Vagts notes that vague treaty provisions are often 'designed to postpone insoluble problems'.[1108]

1101 Endicott (n 80) 5.

1102 Oliver Diggelmann, 'Anmerkungen zu den Unschärfen des völkerrechtlichen Rechtsbegriffs' (2016) 26 Swiss Review of International and European Law 381.

1103 Art. 2(1)(a) VCLT.

1104 ILA Committee on Formation of Customary (General) International Law (n 886) 3.

1105 See however Institut de droit international, 'Problèmes découlant d'une succession de conventions de codification du droit international sur un même sujet' (1995) <www.idi-iil.org/idiF/resolutionsF/1995_lis_01_fr.pdf>, conclusion 11.

1106 Hessler (n 154).

1107 Philip Allott, 'The Concept of International Law' (1999) 10 European Journal of International Law 31, 43.

1108 Detlev F Vagts, 'Treaty Interpretation and the New American Ways of Law Reading' (1993) 4 European Journal of International Law 472, 476.

International law applies, by definition, to various jurisdictions, and its contextualization is likely to vary depending on the characteristics of these legal orders.

A third cause of vagueness arises with the passage of time. The costs of amending a treaty are high, as such changes require the consent of all parties.[1109] Yet the context and circumstances in which treaties are interpreted may evolve drastically over time. Judges face vagueness when examining whether the law can be adjusted to contemporary circumstances. The passage of time also creates interpretative challenges when it comes to identifying unwritten international law.

Vagueness is also encouraged by the institutional features of international law, which is governed by the principle of auto-interpretation. In the absence of an international court empowered to adjudicate international legal disputes, States interpret their obligations without being bound by the interpretations of other international legal subjects. The lack of an overarching interpretative authority creates interpretative uncertainty.[1110]

After highlighting these causes of vagueness in international law, some additional remarks about vagueness are in order. First, vagueness can be either deliberate or fortuitous. It is intentional when States collectively enact norms that require further interpretation and, therefore, allow for domestic contextualization, like the provisions of the ECHR. Vagueness is not entirely contingent on the features of the law. Often (although not always), it also results from the interpretative work judges perform (*infra*, 4.3). Second, in some cases, international law can be precise. This applies, for instance, to treaties aimed at harmonizing an area of the law, eg in trade law, air and space law, or maritime law. The diagnosis of vagueness should not be applied to international law across the board, given the great diversity of its norms. Third, the vagueness of international law can be reduced or prevented, be it on the international plane,[1111] or in the context of the domestic application of international law.[1112] As Timothy Endicott stresses, increasing legal determinacy does not necessarily serve justice: precise regulations can be more arbitrary than vague ones.[1113]

1109 Art. 39 ff VCLT.

1110 Paul Guggenheim, 'What Is Positive International Law?' in George A Lipsky (ed), *Law and Politics in the World Community: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (University of California Press 1953) 29.

1111 (Subsidiary) organs of IOs (eg the ILC) and private bodies (eg the Institut de droit international, the ILA, or Harvard Law School) have produced documents that aim at clarifying (and supporting the codification of) international law.

1112 The (non-binding) US Restatement of Foreign Relations Law, for example, provides guidance for the domestic practice of international law.

1113 Endicott (n 80) 189 f.

However, if vague laws can be interpreted without any constraints, ie, without following a method set out in advance, then vagueness facilitates departures from legality.

To conclude, methods are one way of handling vagueness in domestic and international law. Although they rarely determine interpretative outcomes and do not preclude window-dressing, methods constrain interpreters by requiring them to use specific techniques known to all.

4.2 *Counter-Majoritarian Decisions*

4.2.1 Domestic Law

While there are many competing conceptions of legitimacy,[1114] democratic legitimacy is a well-established[1115] yardstick against which judicial decisions are measured by lawyers and non-lawyers alike. Few would deny that in a democracy, 'uncabined judicial rule'[1116] is a specter that should be driven away. The need to constrain judicial decision-making (eg by requiring that it conforms to specific methods, but also through other democratic checks) is often traced back to the famous 'counter-majoritarian difficulty'.[1117] In short, in a democracy, unelected judges cannot usurp the powers of the lawmaker and overrule decisions taken by the legislative majority. Instead, they must respect the law.

Interpretative methods require judges to focus on specific features of the law, ie, its wording, purpose, drafting history, and place in the broader legislative scheme. In doing so (and, arguably, especially via textual and historical interpretation), judges show respect for legislative enactments, thereby reducing their own democratic deficit.

4.2.2 International Law

Judicial interpretations of international law have counter-majoritarian traits when they disregard sovereign equality (and especially States' equal voice in international lawmaking), or when they ignore other features of the sources of international law. In such cases, judges lack accountability towards the lawmaking States. This risk exists with regard to all sources of international law, ie, treaty law, CIL, and general principles of international law.[1118]

This lack of accountability is encouraged by the characteristics of international lawmaking. Written domestic law is, as French jurist Emile Boutmy

1114 Goldsworthy (n 777) 1.
1115 Of course, the way of assessing democratic legitimacy is deeply controversial.
1116 Klarman (n 831) 1752.
1117 Bickel (n 697) 16 ff.
1118 On general principles, for instance, see Jain (n 73) 133 ff.

notes, like 'the work of art that is dated and signed',[1119] namely an object that can be traced back to a single author. International lawmaking, by contrast, involves at least two States (sometimes in the framework of an IO). It often occurs in a decentralized, dispersed, and incremental fashion, which complicates the interpretative process. Even when international lawmaking is institutionalized (eg when a treaty is adopted after a process of negotiations), in most cases, no permanent international lawmaking body can react to States' (or domestic courts') interpretations by changing the law. Moreover, as previously mentioned, States cannot amend treaties unless all parties consent.

Requiring States and their courts to abide by specific methods when they interpret international law is one way of enhancing their accountability. Methods narrow the scope of what constitutes a lawful interpretation, and they compel States to respect the sources of international law.

4.3 *Judicial Politics*

4.3.1 Domestic Law

Partly due to the vagueness of domestic (and especially constitutional) law (*supra*, 4.1) and to judges' institutional independence from the legislature (4.2), courts enjoy discretion[1120] when it comes to deciding cases, and they may be tempted to abuse it.

Courts may settle on what can be perceived as bold interpretations. They sometimes interpret domestic laws *contra legem*, and they have created rights based on ambiguously worded provisions.[1121] US constitutional legal scholars such as Michael Klarman even argue that some US Supreme Court decisions are explicable 'only in terms of the [...] majority's partisan political preferences',[1122] although the Justices (like judges in other countries) forcefully deny it.[1123]

Critical legal scholars have highlighted the creative features of adjudication. Duncan Kennedy for instance challenges Hart's distinction between the law's 'core of settled meaning', within which the law is precise, and its 'penumbra of doubt', ie, the cases in which the law becomes indeterminate.[1124] Kennedy

1119 Emile Gaston Boutmy, *Des rapports et des limites des études juridiques et des études politiques* (Armand Colin 1889) 8.

1120 On judicial discretion and its relationship to interpretation, see Barradas de Freitas (n 127) 190.

1121 *Griswold v. Connecticut*, 381 U.S. 479 (1965). On Swiss courts, see Hertig Randall and Chatton (n 441) 393.

1122 Klarman (n 1036) 1724. See also the references in footnote 10 in Petersen (n 73).

1123 Klarman (n 1036) 1724.

1124 Kennedy, 'A Left/Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation' (n 176). On the dialectical relationship between HLA Hart and Duncan

argues that the boundary between the core and the penumbra is not inherent in the features of the law. Rather, in many cases, it is the result of judicial interpretation. The judge is analogous to a worker on a field that is 'open to manipulation': she can, up to a certain extent, 'shape' the law to make it fit the purpose she has in mind.[1125] While interpretative solutions are presented as objectively correct, objectivity is partly defined by judges themselves.

Kennedy's (and other scholars') critique of adjudication is a powerful reminder of the conscious and unconscious biases of judicial decision-making. It draws attention to, and cautions against, the reality of the practice and the phenomenology of judicial decision-making. It also highlights the need to harness judicial discretion and to prevent arbitrariness, a necessity most legal scholars acknowledge.

One way to move closer to this goal is, again, to require judges to use interpretative methods as guides in their decision-making. Interpretative methods aim at bringing light upon the black box of judicial discretion. They provide a benchmark against which exercises of judicial power can be evaluated and anticipated with reasonable certainty. While methods do not eliminate biases, they make it more difficult for courts to decide based on their own 'sweet will and whims'.[1126]

4.3.2 International Law

In international law, the risk of arbitrary interpretations is arguably even greater than in domestic law. International law is, as already mentioned, governed by the principle of auto-interpretation: in the absence of international dispute settlement bodies that have the authority to review domestic interpretations, States interpret their own obligations without being bound by the interpretations of other subjects of international law. Two States' divergent interpretations are equal in the sense that none trumps the other. Their legal authority is confined to both States' respective legal orders.

Auto-interpretation is a principle with notable exceptions. In some cases, international and regional courts have the power to review States' interpretations, subject to the specific relationship of authority that exists between a

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Kennedy, and on the implications of their work for domestic courts' interpretations of international law, see Ammann, 'How Do and Should Domestic Courts Interpret International Law? Insights From the Jurisprudence of H.L.A. Hart and Duncan Kennedy' (n 817).

1125 Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (n 75).

1126 Timothy Endicott, 'The Coxford Lecture: Arbitrariness (in Judicial and Public Authority Decision Making)' (2014) 27 Canadian Journal of Law and Jurisprudence 49.

given international adjudicatory body and States.[1127] Nonetheless, while international courts have been 'proliferating'[1128] in recent decades, giving rise to an equally prolific scholarship,[1129] the practical significance of auto-interpretation should not be underestimated.

Auto-interpretation increases the interpretative discretion of States and their courts in several respects. First, the fact that States are judges in their own cause creates risks of partiality. Realist scholars consider it irrational for States to interpret their obligations in a way that jeopardizes their own interests.[1130] Courts too can be tempted to base their decisions on prudential considerations. Congyan Cai writes about the Chinese 'judicial policy toward international law',[1131] and similar tendencies exist in other domestic courts.[1132] Another risk is that of bootstrapping, or of self-referential interpretations: courts may ascertain international law primarily based on their own (or their State's) practice, as opposed to also referring to the practice of other States.[1133]

Second, and relatedly, States and their organs might disregard the sources of international law (see Chapters 7 and 8, *infra*).[1134] Such flaws are deeply problematic, given that States, in such cases, are no longer interpreting the law under consideration. Taking interpretative methods seriously means accounting for the essential features of international law and for the process by which it came into being. While auto-interpretation leaves room for divergent interpretations, it does not entail that States can freely choose their interpretative methods. States must respect secondary norms of international law if they are to interpret international law, as opposed to doing something else.

1127 The ICJ's jurisdiction is conditional upon a declaration of the parties pursuant to art. 36 ICJ Statute, the ICC's jurisdiction is complementary to that of domestic institutions (art. 17 ICC Statute), and interventions of the ECtHR are subsidiary to those of domestic institutions (art. 35(1) ECHR; see also Protocol 15 to the ECHR (yet to enter into force)).

1128 Benedict Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) 31 New York University Journal of International Law and Politics 679.

1129 Cesare Romano, Karen Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014).

1130 Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press 2005). See also Gross (n 844) 287.

1131 Congyan (n 44) 270.

1132 *Medellín v. Texas*, 552 U.S. 491 (2008).

1133 Besson and Ammann (n 60). This tendency has been confirmed by empirical work, see Bart MJ Szewczyk, 'Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions' (2014) 82 George Washington Law Review 1118, 1133. See also Chapters 7–8 (*infra*).

1134 Eg Vagts (n 1108) 481.

To conclude, given the vagueness of international law (4.1), the countermajoritarian features of judicial interpretation (4.2), and the prevalence of auto-interpretation (4.3), the interpretation of international law needs 'shared standards for estimating which professional work is valuable'.[1135] It needs them just as – and arguably even more than – the interpretation of domestic law and other interpretative practices do.

5 Three Objections against Interpretative Methods

While there is a case for constraining the power of courts through interpretative methods (*supra*, section 4), many lawyers and scholars are, for various reasons, skeptical about interpretative methods, and therefore also about efforts to clarify and emphasize them. Skepticism has especially increased under the influence of legal realism and, in continental Europe, with the rise of postmodern thought, although many scholarly strands highlight the weaknesses of interpretative methods.[1136] Once again, common critiques raised in international law roughly mirror the domestic ones.

Mainstream challenges against interpretative methods pertain to the fact that norms prescribing the use of interpretative methods are just as vague as other laws (5.1), that they are self-defeating, because they are shaped by the very actors they are supposed to constrain (5.2), and that an emphasis on methods neglects interpretative outcomes (5.3). I refer to these objections as the 'vague methods' objection, the 'self-made methods' objection, and the 'outcome over process' objection. The three objections are more complex than what can be elucidated here, and they do not exhaust the challenges raised against interpretative methods. For reasons of scope, I focus on these common critiques, and I respond to each of them.

5.1 *The 'Vague Methods' Objection*

Many theorists of domestic law doubt that methods can constrain judicial reasoning. They consider that methods provide judges with convenient legitimizing devices that these judges can twist. Hart himself notes that methods cannot prevent judicial discretion, since methods, like any law, need to be interpreted.[1137] This observation is made by many

1135 Donald G Marshall, 'Literary Interpretation' in Joseph Gibaldi (ed), *Canonicity and Textuality* (Modern Languages Association of America 1992) 173.

1136 Hart (n 78) 126.

1137 See ibid.

scholars,[1138] eg by Stanley Fish[1139] in response to Owen Fiss's account of so-called 'disciplining rules' in interpretation, both inside and outside the law.[1140] The legal realists (like the 'political realists')[1141] have stressed that methods do not determine the outcome of judicial decision-making, that they leave room for considerations of policy,[1142] and that judges use methods for the purpose of *post hoc* rationalization.[1143] Critical legal scholars also highlight the influence of 'ideological' considerations on judicial decisions.[1144] Postmodern thinkers view the interpreter (and the interpretative object) as a matrix of meaning. Jacques Derrida for instance emphasizes the radical indeterminacy of interpretative objects, and he describes the interpretative process as an infinite regress from one text to another.[1145] Such views have been influential beyond literary theory,[1146] including in legal scholarship.[1147] Without necessarily being skeptical, scholars have shown the pitfalls and 'leading vices'[1148] of interpretative reasoning. Even conservative legal scholars emphasize that judicial decisions result from 'interpretive choice'.[1149]

In international law, interpretative methods leave room for discretion as well. Martti Koskenniemi argues that the sources of international law cannot be identified in an apolitical way.[1150] Common norms do not eliminate the need for evaluation, and hence reliance on 'essentially contested – political – principles'.[1151] International law, according to Helmut Aust, only requires

1138 Karl N Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules and Canons About How Statutes Are to Be Construed' (1950) 3 Vanderbilt Law Review 395; Bankowski and others (n 132) 15.

1139 Stanley Fish, 'Fish v. Fiss' (1984) 36 Stanford Law Review 1325.

1140 Fiss (n 1029).

1141 On this topic, see Evan Criddle, 'The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation' (2004) 44 Virginia Journal of International Law 431, 470 f.

1142 Holmes (n 22); Tushnet (n 777) 50.

1143 Klarman (n 831).

1144 Kennedy, *A Critique of Adjudication* (n 78).

1145 Eg Jacques Derrida, 'Signature, événement, contexte', *Communication au Congrès international des Sociétés de philosophie de langue française* (Montreal 1971). See also Jacques Derrida, 'Le langage (Le Monde au téléphone)' *Le Monde Dimanche* (Spring 1982); Jacques Derrida, *Mémoires : pour Paul de Man* (Galilée 1988). I am grateful to Yousif M. Qasmiyeh for drawing my attention to these other pieces.

1146 Sontag (n 996) 106.

1147 Amstutz and Niggli (n 105).

1148 MacCormick and Summers (n 1034) 539 ff.

1149 Vermeule (n 76).

1150 See (with regard to CIL): Koskenniemi (n 1064) 25 f.

1151 See ibid 7.

'convergence at a very high level of abstraction'.[1152] The ascertainment of the object and purpose[1153] of a treaty, for instance, is viewed by some scholars as an 'enigma'.[1154] Similar difficulties apply to other methods listed in the VCLT. Regarding unwritten international law, Jean d'Aspremont observes that today, 'the intellectual prison of custom seems to be gradually transformed into a large dance floor where (almost) every step and movement is allowed or, at least, tolerated'.[1155] Custom is deemed an 'untid[y]' source,[1156] and the ILC's draft conclusions on custom have been criticized for being too vague, and therefore of limited practical use.[1157]

These various criticisms and observations touch upon an important issue: norms about interpretative methods limit judicial discretion only up to a certain point. Even the General State Laws for the Prussian States did not succeed in regulating every possible case in advance. As Mark Tushnet points out, 'there are no institutional mechanisms for committing judges to particular interpretive methods'.[1158] Courts enjoy some leeway at all stages of the interpretative process, be it when choosing what methods to use at what stage of their reasoning, when applying these methods, when weighing the results yielded by different methods and, finally, when drafting their rulings.[1159]

What the critique overlooks is, first, that the fact that methods are elastic and that judges might (and sometimes do) bend them does not demonstrate that they are not worth imposing on judges. People break the law, yet States have laws nonetheless. Of course, there is room for improvement as regards States' use of interpretative methods.[1160] I am not arguing that interpretative methods are risk-free. However, judges' fallibility does not demonstrate that interpretative constraints should be discarded.

1152 Helmut Philipp Aust, 'Between Universal Aspiration and Local Application: Concluding Observations' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016) 337.

1153 Art. 31(1) VCLT.

1154 Isabelle Buffard and Karl Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 Austrian Review of International & European Law 311.

1155 Jean d'Aspremont, 'Customary International Law as a Dance Floor: Part I' (*EJIL: Talk!*, 2014) <www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/>.

1156 Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 59.

1157 Sienho (n 960) 8 f.

1158 Tushnet (n 777) 51.

1159 Judicial decisions may or may not accurately reflect actual processes of deliberation. See ibid 48.

1160 Talmon (n 73); Iovane (n 182).

Secondly, the critique rightly highlights that evaluative judgments cannot be eliminated from judicial decision-making. In fact, they are even necessary to prevent tyranny. On the other hand, the objection neglects that such value judgments must be kept in bounds. Requiring that courts respect specific methods is one way of doing so. While methods do not eliminate the risk of arbitrariness, they marginalize at least some justifications that could be submitted by courts in support of a given decision. Methods also provide a basis to appraise, contest, and defend judicial decisions.

Thirdly, and paradoxically, the objection demands too much from interpretative methods. It forgets that judges' compliance with the law cannot merely be achieved through interpretative norms. Compliance also depends on the attitude of the law's interpreters,[1161] and on the stringency with which other participants in the practice (including scholars) criticize deviations from these mandatory canons.

5.2 *The 'Self-Made Methods' Objection*

Interpretative methods also trigger skepticism because States (and judges) at least partly define the constraints that limit their own interpretations. In domestic law, Duncan Kennedy points out that the distinction between the Hartian 'penumbra of doubt' and 'core of settled meaning' is often drawn (and can potentially be shifted) by the judge.[1162] This also applies to interpretative methods, which – just like the rules of a game can be used to the player's advantage – can be bent to fit the interpreter's preferences and to support a given outcome. In many legal orders, interpretative methods are the product of judicial lawmaking, not of legislative action (*supra*, 3.1).[1163] Because methods can constrain interpreters but also, to some extent, be shaped and adjusted by them, their use can be a virtue as well as a vice.

Similarly, in international law, methods are shaped by the very entities they are primarily supposed to limit, namely States. '[T]he closer to state practice an argument is, the less normative and the more political it seems', Martti Koskenniemi writes.[1164] But then, Ingo Venzke asks, '[h]ow can we understand

1161 On judicial integrity, see Hannah Arendt, 'Thinking and Moral Considerations: A Lecture' (1971) 38 Social Research 417.

1162 Kennedy, 'A Left/Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation' (n 176).

1163 For codifications of these methods, however, see art. 6 of the Austrian Civil Code of 1 June 1811; art. 12 of the Italian Civil Code of 16 March 1942. See also the references in Waibel, 'Principles of Treaty Interpretation: Developed for and Applied by National Courts?' (n 183) 27 f.

1164 Koskenniemi (n 1064) 8.

interpretation as constrained by rules if it is that same practice that creates the rules?'[1165]

The aforementioned criticism underlines an important feature of interpretative methods. Methods, *qua* secondary norms, are first and foremost customary. They are shaped by those whose legal duty it is to apply and to respect the law. As regards methods that have been codified, States and their officials are involved in the codification process as well. On the other hand, the critique neglects a range of points.

First, it is doubtful that other actors are better placed than State institutions when it comes to defining interpretative methods. This is especially the case in international law, where State sovereignty is a pressing concern. Granted, methods should be such that they can truly constrain official (and judicial) decision-making, rather than being vulnerable to being bent by those they are meant to constrain. However, their constraining effect depends not only on their content and on the way these methods are established, but also – and arguably even more so – on the mechanisms deployed to monitor their respect.

Second, in international law, methods are shaped by States collectively. They cannot be defined by one State unilaterally. Moreover, the ILC has codified and systematized interpretative methods in international law, thereby imposing an external constraint on States.

Third, there are checks on the way interpretative methods are applied, even in international law, and despite the fact that these checks are informal and decentralized. Interpretative methods are one of the main yardsticks by which domestic rulings are evaluated on the international plane.

Fourth, auto-interpretation is not synonymous with an 'auto-determination of interpretative methods'.[1166] Granted, States are relatively free within their own jurisdiction, and it is doubtful that international law has 'one true meaning' that must be ascertained by domestic courts 'untrammeled by notions of [their] national culture'.[1167] The methods of the VCLT, for instance, do not aim at harmonizing the outcome of treaty interpretation. This notwithstanding, there are methods that international law requires States to follow when they interpret their obligations.

1165 Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (n 126) 54 f.

1166 Besson and Ammann (n 97).

1167 *Secretary of State for the Home Department, Ex Parte Adan R v. Secretary of State for the Home Department Ex Parte Aitseguer, R v.* [2000] UKHL 67; [2001] 2 WLR 143; [2001] 1 All ER 593 (19 December 2000) (Lord Steyn).

5.3 *The 'Outcome Over Process' Objection*

Without necessarily being skeptical of interpretative methods, it can be argued that regardless of the methods domestic courts use, what matters is the interpretative result.

In domestic law, some Swiss lawyers believe that theorizing judicial interpretation is a superfluous academic exercise. The pragmatic methodology of the Swiss Federal Tribunal, they claim, has proven itself.[1168] In the United States, Michael Klarman considers it plausible that 'history's verdict on a [US] Supreme Court ruling depends more on whether public opinion ultimately supports the outcome than on the quality of the legal reasoning or the craftsmanship of the Court's opinion'.[1169] In the United Kingdom as well, it is 'not infrequent[ly] suggest[ed] that what is important is not what the courts say about statutory interpretation, but what they in fact decide in regard to the statutes which come before them'.[1170] A related argument consists in saying that what matters is that the judgment achieves a specific result, eg (depending on what normative position one endorses), that it precludes grave violations of fundamental rights or that it protects democratic decisions. A strict adherence to methodological standards may, in some cases, prevent such a result. This argument is reflected in John Dewey's claim that interpretation must be informed by policy, and that legal norms are tools that must be in service of social needs.[1171] Focusing on interpretative methods could hence be criticized for dealing solely with 'façade legitimation',[1172] and not with legitimacy in the proper sense, however legitimacy is defined.

From the perspective of international law as well, it can be argued that what matters for international law is less the interpretative process than the result reached by States (*inter alia* via their courts). Pursuant to the idea that in international law, the State is a 'black box',[1173] what matters from the vantage point of international law is that States abide by their international obligations.[1174] How they choose to do so, however, is left for them to decide.

The 'outcome over process' objection raises – once again – concerns that should not be hastily swept aside. Focusing on the outcome of judicial decision-making is helpful, as it prevents losing sight of the consequences of

1168 Walter (n 118).
1169 Klarman (n 1036) 1722. See also ibid 1747 ff.
1170 *The Interpretation of Statutes* (n 54) 5.
1171 Dewey (n 777).
1172 Bankowski and others (n 132) 16.
1173 Ferdinandusse (n 856).
1174 Art. 26 f VCLT.

these decisions. Domestic rulings, to be socially accepted and to be obeyed in the long run, need to deliver more than mere conformity to methodological standards.

Still, the 'outcome over process' criticism seems exaggerated on more than one count. First, process and outcome are not disconnected: they are two sides of the same coin. Using interpretative methods that are required by law can influence the interpretative outcome, even if this is not always the case. Even when the outcome remains unchanged, the interpretative process is important, as it explains and seeks to justify the interpretative result. The concept of 'interpretation' itself refers both to the interpretative process and to its result.

Second, international law is not blind to interpretative outcomes. The VCLT's methods emphasize the parties' duty to interpret treaties in 'good faith', holistically, and so as to avoid 'ambiguous or obscure' and 'manifestly absurd or unreasonable' interpretative results.[1175] Thus, the VCLT regulates both the interpretative process and its outcome.

Third, the pervasiveness of disagreement in interpretation, judicial interpretation, and international law makes it essential to agree on common methods in order to evaluate the merits of incompatible decisions.

6 Conclusion

Standard objections to having methods of judicial interpretation should not be dismissed quickly. They recall aspects related to the phenomenology of judicial decision-making. They also raise the difficult and controversial question of the outcome that judicial decisions should achieve. Yet little is gained by abandoning methodological imperatives in judicial decision-making and, thus, by opening the door of the courtroom wider to arbitrary decision-making. Of course, interpretative methods are not a panacea. Interpreters need to choose among competing interpretative results yielded by different methods. Methods must be applied in a predictable, clear, and consistent way. If they are not, they become convenient yet deceitful 'judicial marketing' tools.[1176] In short, we should not overestimate what interpretative methods can achieve, nor should we downplay their contribution to legality in domestic and international law.

1175 Art. 31 f VCLT.

1176 Isabelle Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 European Journal of International Law 605, 640.

CHAPTER 6

The Interpretative Methods of International Law: What Are They, and Why Use Them?

> [I]nterpretation is not a mere technical device, but a political matter of the utmost importance: it may eventually depend on which interpretative method is applied whether a state (or any other actor, for that matter) can be accused of an internationally wrongful act, or whether it will be regarded as having stayed faithful to its commitments.[1177]

1 Introduction

In Chapter 5 (*supra*), I have stressed that interpretative methods guide domestic and international legal practice, and that there are good reasons for requiring judges to abide by them. I have not yet examined the specific interpretative methods of international law, and the reasons for using these methods in particular.

The present chapter is devoted to these issues. These questions matter because States (including courts) must know what methods the law requires them to apply, and because the addressees of legal decisions must know by which standards States and their authorities should be held accountable. Moreover, it is essential to grasp the importance of *each and every* method, and the relationship between all of them.

In this chapter, I claim that States, to honor their international obligations, must use the interpretative methods of international law, namely textual, systematic, teleological, and historical interpretation. Trivial and uncontroversial as this point may seem, it is too often discarded or overlooked by scholars and

1177 Klabbers, 'International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?' (n 994) 274.

courts. This neglect of interpretative methods jeopardizes the legality and the predictability, clarity, and consistency of judicial reasoning.

My goal, in this chapter, is two-fold. First, I identify the interpretative methods that must be used to interpret international law. These methods, I argue, apply to *all* sources of international law. Second, I explain why there are good reasons[1178] for using these methods. Interpretative methods should not be neglected, even if this is often the case in practice.

I do not argue for the priority of one method over others (ie, for the validity of one particular normative interpretative theory, *supra*, Chapter 2, 5.1). Karl Llewellyn, by noting that every 'parry' comes with a 'thrust', has shown that every interpretative canon can be countered by another contradictory one.[1179] Methods point in different directions, and all these directions, I claim, deserve attention. My endeavor thereby differs from that of scholars who have put forward a full-fledged theory of interpretation of international law.[1180]

2 The Interpretative Methods of International Law

To obtain a better understanding of the methods required by international law, it is useful to rely on insights gained in domestic law. Contrary to what is often assumed, the interpretative methods of domestic and international law share the same traits (*supra*, Chapter 5, 3.3). What differs between domestic and international law are some features of their lawmaking processes.[1181] These differences may have some implications for their respective interpretative methods,[1182] but the basic characteristics of these methods are the same.

To identify the interpretative methods of international law, I consult the VCLT and the ILC's draft conclusions on identification of CIL.[1183] One could

1178 I will not examine whether the use of these methods makes an interpretation legitimate all things considered. As previously mentioned, this question is beyond the scope of my study (*supra*, Introduction, section 3). However, some of the claims I make in this chapter do provide elements for such a theory of legitimacy.

1179 Llewellyn (n 1138). Sean D. Murphy has transposed Llewellyn's theory to international law: Murphy (n 163) 16 f.

1180 One example is the theory developed by Letsas (n 79).

1181 Eg the fact that international lawmaking requires the involvement of at least two States.

1182 Eg in treaty interpretation, a broader definition of context encompassing, *inter alia*, other international legal acts and the practices of the treaty parties. See art. 31(3)(b) and (c) VCLT.

1183 ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

argue that the ILC's mandate consists not only in the codification, but also in the 'progressive development' of international law.[1184] One could also contend that the customary status of the methods of the VCLT is controversial. Thus, these two instruments might arguably not reflect customary methods or serve as useful interpretative guides. However, I submit that there are good reasons for relying on them.

First, both documents seem the most obvious starting point for an analysis of the interpretative methods of international law. The customary status of the VCLT's methods was, indeed, controversial at the time the Convention was adopted,[1185] and the ICJ affirmed it only gradually.[1186] In the early 1930s, scholars considered that treaty interpretation was 'among the most confused subjects in international law'.[1187] However, at the time of their drafting, the relevant provisions of the VCLT triggered few comments by States, who mainly disagreed about the weight to be given to these methods,[1188] and hence about normative interpretative theories (*supra*, Chapter 2, 5.1). Admittedly, art. 31 f VCLT catalyzed the formation of customary law on treaty interpretation, which was still embryonic at that time.[1189] Yet today, and for at least the past three decades, an overwhelming majority[1190] of States, domestic and international courts (including the ICJ), and international lawyers deem the VCLT a reflection of customary methods of treaty interpretation.[1191]

As to the ILC's draft conclusions on identification of CIL, which were finalized in 2018, one could argue that it is too early to consider them a reliable reflection of customary methods. The draft conclusions can be criticized for

1184 Art. 1(1) ILC Statute.

1185 Gardiner (n 359) 76. See also Yves Le Bouthillier, 'Article 32' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary, Vol I* (Oxford University Press 2011) 843 f.

1186 Gardiner (n 359) 13 ff.

1187 Yi-Ting Chang, *The Interpretation of Treaties by Judicial Tribunals* (Columbia University Press 1933) 19, cited by 'Article 19. Interpretation of Treaties' (n 121) 939.

1188 Sorel and Boré-Eveno (n 1044) 815 f.

1189 See ibid 806. See also ibid 810 f.

1190 By contrast, the CJEU is more reluctant to do so, see Sorel and Boré-Eveno (n 1044) 822.

1191 Gardiner 146 ff; Jean d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing 2012) 151. See also the references to the ICJ's case law on art. 31 VCLT in Petersen (n 73) n 53. Some scholars press for a redrafting of the VCLT's interpretative provisions: Chang-fa Lo, *Treaty Interpretation Under the Vienna Convention on the Law of Treaties: A New Round of Codification* (Springer 2017).

predominantly drawing on the practice of the ICJ and other international courts. Moreover, some scholars deem them minimalistic and removed from practical considerations.[1192] However, there are good reasons for relying on the draft conclusions as a starting point: they have not met with fundamental criticism on the part of States;[1193] the ILC endeavored to collect information from States regarding their practice;[1194] and the conclusions are the most recent statement of the methods of identification of customary law elaborated in an inclusive, public, and international forum.

A second reason for relying on these two resources is, of course, that ascertaining State practice and *opinio juris* from scratch with regard to the interpretative methods of treaty law, CIL, and general principles is an extraordinarily laborious task that is beyond the scope of this study. In addition to these two documents, I draw upon the comments made by the governments of the States involved in their drafting process[1195] (except for documents unavailable in French or English) or by international or regional organizations such as the AALCO.[1196] I also build on the efforts of other bodies than the ILC to clarify the interpretative methods of treaty law and CIL,[1197] and on international legal scholarship. When relying on these resources, it is essential to focus, whenever possible, on expressions of State practice and *opinio juris*, since norms about mandatory interpretative methods are customary norms.

1192 Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology and the Idyllic World of the ILC' (*EJIL: Talk!*, 2015) <www.ejiltalk.org/determining-customary-international-law-the-icjs-methodology-and-the-idyllic-world-of-the-ilc>.

1193 See the comments submitted by governments at <legal.un.org/ilc/guide/1_13.shtml>. As indicated by Noora Arajärvi, governmental statements made in the UN General Assembly can be retrieved on <papersmart.unmeetings.org>: Arajärvi (n 37) 19, footnote 49. See however the forceful critique of BS Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 American Journal of International Law 1.

1194 ILC, 'Report of the International Law Commission, Sixty-Fourth Session (7 May–1 June and 2 July–3 August 2012)' (2012) UN Doc A/67/10 8. The document forming the basis for Switzerland's submission is Besson and Ammann (n 60).

1195 These comments are included in the ILC's analytical guides on the law of treaties ('Comments by Governments', <legal.un.org/ilc/guide/1_1.shtml>, especially <legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_182.pdf&lang=EF>) and on the identification of CIL ('Comments by Governments', <legal.un.org/ilc/guide/1_13.shtml>).

1196 Sienho (n 960); Sufian Jusoh, 'A Dialogue Between UN and AALCO Experts on Identification of Customary International Law' (2016) 15 Chinese Journal of International Law 1.

1197 On the law of treaties, see Institut de droit international, 'Interprétation des traités' (1956) <www.idi-iil.org/idiF/resolutionsF/1956_grena_02_fr.pdf>; 'Harvard Draft Convention on the Law of Treaties' (1935) 29 American Journal of International Law 657. On CIL, see ILA Committee on Formation of Customary (General) International Law (n 886).

It is important to concede that these means cannot replace such a comprehensive survey of State practice and *opinio juris*.

Although I start from the VCLT and from the ILC's work, the methods these documents identify should not be taken for granted.[1198] The fact that most States and other actors deem a method customary does not prove its customary status. Both documents should therefore be approached critically, contrary to what is often the case in scholarship. In this chapter, I will examine whether there are compelling reasons to doubt these methods' customary character, but also to require States to use these methods.

The interpretative methods of international law fall into four categories: textual (2.1), systematic (or contextual) (2.2), purposive (or teleological) (2.3), and historical (2.4).[1199] They are congruent with the four methods of statutory interpretation identified by Friedrich Karl von Savigny. Scholars have noted that Savigny's methods 'can be observed in every national methodology',[1200] even if States' terminology to describe them is inconsistent (especially between common law and civil law jurisdictions). I analyze the relationship between the four methods in the last section of this chapter (2.5).

One important claim that I make in this chapter – and which is in disagreement with mainstream scholarship – is that the aforementioned four methods

1198 This is what the great bulk of international legal scholarship seems to do, at least regarding art. 31 f VCLT. For an iconoclast position, see d'Aspremont, 'The International Court of Justice, the Whales, and the Blurring of the Lines Between Sources and Interpretation' (n 224) 1030. See also Klabbers, 'Virtuous Interpretation' (n 93). Klabbers seems to suggest that the VCLT's methods are not customary (i) because interpretation is not governed by rules, which conflates the question of the source of interpretative methods with the type of obligations these methods create; (ii) because there were proponents of different approaches to interpretation before the VCLT was adopted, an argument that disregards the distinction between interpretative methods and normative interpretative theories (*supra*, Chapter 2, 5.1); (iii) because in international legal practice, no sanction is attached to the violation of interpretative methods. Yet methods are duty-imposing secondary norms, regardless of how the law addresses departures from them. Moreover, the customary character of a norm does not hinge on whether this norm is assorted with a sanction. Klabber's third argument also seems to contradict his own statement in Klabbers, 'International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?' (n 994) 274.

1199 See also Schlütter (n 179) 97.

1200 Larry A DiMatteo and André Janssen, 'Interpretive Methodologies in the Interpretation of the CISG' in Larry A DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press 2014) 83. See also Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen* (Mohr Siebeck 2001).

govern the interpretation of treaties, but also of CIL[1201] and general principles of international law. Analyses of the methods of identification of CIL largely focus on State practice and *opinio juris*.[1202] These elements are not methods, however, but constitutive elements of custom that require to be ascertained – and doing so requires using specific methods. The four methods also apply to general principles. The few rulings and scholarly writings available have highlighted the importance of (careful) analogical reasoning[1203] and comparative[1204] reasoning for the purposes of ascertaining general principles, but they have rarely talked about interpretative methods. Given the scarce practice pertaining to general principles of international law, my comments on them will primarily draw from scholarly writings.

Before moving on to the analysis, some final caveats are in order. First, by analyzing the aforementioned four methods, I do not exclude the existence (present or future) of other (or more specific) customary interpretative methods. However, the four methods highlighted in this chapter deserve particular emphasis. The four methods of art. 31 f VCLT are the least disputed interpretative methods in international law. Of course, this agreement in principle does not preclude disagreements about the proper application of these methods, nor does it rule out inconsistencies and mistakes in their application, or even occasional departures from them. Importantly, the four methods are broad

1201 See (with many practical examples) Merkouris (n 199); Merkouris (n 231). My position on the applicability of the VCLT's methods to CIL somewhat differs from that of Merkouris, who argues that the VCLT's methods apply to CIL once this custom has been ascertained. *Contra* Schlütter (n 179) 90. See also ICJ, case concerning *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*), merits, ICJ Reports 1986, 14, at 95, para 178. However, the Court's statement that treaty law and customary law 'are distinguishable by reference to the methods of interpretation and application' points to the 'institutions or mechanisms [established] to ensure implementation of the rule' rather than to differences in terms of interpretative methods as understood in this book.

1202 For such a finding, see Merkouris (n 231). For a recent example, see ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891). See also Niels Petersen, 'Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' (2007) 23 American University International Law Review 275; Arajärvi (n 37).

1203 Besson, 'General Principles in International Law: Whose Principles?' (n 935) 36; Jaye Ellis, 'General Principles and Comparative Law' (2011) 22 European Journal of International Law 949, 958 f; Thirlway (n 1156) 97 f; Weiss (n 936) 407 f.

1204 Besson, 'General Principles in International Law: Whose Principles?' (n 935) 36; Ellis (n 1203) 955 ff; Thirlway (n 1156) 95; Stephan W Schill, 'General Principles of Law and International Investment Law' in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Brill/Nijhoff 2012); Weiss (n 936) 407.

enough to encompass a number of more specific ones. Evaluating these methods can hence yield useful insights about these more specific methods as well.

A second caveat is that I argue from the assumption that there are general interpretative methods, namely methods that apply to all international legal acts regardless of their subject matter. Some authors argue that selected substantive regimes of international law are governed by 'special' or 'specialized' methods that depart from the 'general' interpretative methods (eg the methods of the VCLT).[1205] Yet what varies between these so-called 'general' versus 'special' methods is not the method *per se*, but the type of interpretative material that is available in different regimes of international law. This point also applies to CIL[1206] and to general principles of international law.

Third, some topics are excluded from this chapter. I do not address States' duty to interpret treaties 'in good faith',[1207] which is an axiological interpretative principle (*supra*, Chapter 2, 5.2) rather than an interpretative method. Nor do I focus on the interpretation of multilingual treaties (art. 33 VCLT), which is not a method, but a rule addressing specific difficulties liable to arise in connection with textual interpretation.

2.1 *Textual Interpretation*

2.1.1 Domestic Law

Textual (or literal) interpretation is the use of the ordinary meaning of written acts to ascertain the law. What does domestic legal theory tell us about this method? Is it legally required in domestic legal orders? If so, are there good reasons for requiring its use?

Few lawyers would dispute that the text is the starting point to ascertain the meaning of written laws (eg statutes). In fact, it is difficult to imagine how they could, since the text is the most straightforward feature of written law. Textual interpretation is the first method in Savigny's 'four elements' doctrine and the first method courts refer to.[1208] Textual interpretation, called the 'plain

1205 Catherine Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012). *Contra* Eirik Bjorge, 'Different Regimes, Different Methods of Interpretation?' in Mads Andenas and Eirik Bjorge (eds), *The Evolutionary Interpretation of Treaties* (Cambridge University Press 2014).

1206 Wood (n 14) 9. See also Wood's observation that the different regimes of CIL are interconnected: ILC, 'First Report on Formation and Evidence of Customary International Law by Special Rapporteur Sir Michael Wood' (n 185) 7 f, para 19; ILC, 'Second Report on Identification of Customary International Law by Special Rapporteur Sir Michael Wood' (n 578) 11 ff, para 28.

1207 Art. 31(1) VCLT.

1208 Eg BGE 141 II 436, at 4.1; BGE 140 II 415, at 5.4.

meaning rule' in US law, and the 'literal rule' in English law, is also a standard method in common law jurisdictions.[1209]

Hence, some might even argue that textual interpretation is on a different level than other methods, which are subordinated to it. Other methods, one might claim, are only ways of interpreting wording: since we are always looking at words, textual interpretation is not a self-standing method.

It is true that interpreters, because they are embedded in a communicative practice, cannot help but look at ordinary meaning. Yet textual interpretation is an autonomous method, even if other methods may require textual interpretation as well, and *vice versa*. The focus on ordinary meaning, as banal (and central) as it may seem, is a distinctive way of ascertaining the law. Moreover, in legal interpretation, the *interpretandum* is not the text itself, but a social fact that is (in most cases, but not always)[1210] expressed in words.

Textual interpretation is warranted on several grounds. First, it limits the discretion of decision-makers by forcing them to consider the wording adopted by the legislature. Savigny for instance deemed the text a mediator between the legislature and its subjects.[1211] Second, the text is easily identifiable and accessible, even if there can be reasonable disagreement about its meaning. Ascertaining the purpose, legislative history, and context of legal acts may require extensive research; the text is usually straightforward.

Textual interpretation can be criticized on various counts. First, it is only helpful if the wording is determinate. Some even contest the concept of 'plain', 'ordinary meaning'; in their view, texts are never determinate, and their meaning, like a chameleon, changes with the context.[1212] Undoubtedly, we often disagree about the meaning of texts, the ambiguity of which can be deliberate or fortuitous. Yet legal texts are not radically indeterminate. They are embedded in our social communicative practices. As Aharon Barak puts it, '[w]ords *do* have meaning. A cigarette is not an elephant'.[1213]

1209 See the so-called 'semantic' and 'syntactic canons' described by Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012).

1210 CIL, for instance, can be expressed in non-verbal acts. Of course, to interpret these acts, the interpreter is likely to use written materials of some sort, but the *interpretandum* itself is not expressed in words.

1211 von Savigny (n 761) 213.

1212 Derrida, 'Signature, événement, contexte' (n 1145). See also Amstutz (n 790). Stanley Fish argues that the meaning of texts differs from one interpretive community to another. See Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (n 982) 5.

1213 Aharon Barak, 'Hermeneutics and Constitutional Interpretation' (1992) 14 Cardozo Law Review 767, 767.

A second objection is that textual interpretation only applies to written law. Yet this disregards that unwritten law is often ascertained via verbal acts, eg auxiliary means.

Third, one might observe that there are different methods for ascertaining the ordinary meaning of texts.[1214] Hence, textual interpretation arguably creates more difficulties than it purports to solve. True, methods do not state how they should be employed, and textual interpretation, like any method, can be conducted in light of other methods. Yet this does not make textual interpretation useless. Any approach to textual interpretation is a normative position that must be argued for. Methods are not interpretative theories (*supra*, Chapter 2, 5.1). We cannot expect them to solve problems they cannot tackle.

Fourth, textual interpretation can be (and is often) criticized when it disregards other interpretative methods. Yet the fact that one-sided, 'textualist' approaches are misguided does not lead to the conclusion that textual interpretation is flawed. Using textual interpretation does not require endorsing originalism, for instance (*supra*, Chapter 2, 5.1).

To conclude, there are good reasons for using textual interpretation in full awareness of its strengths and weaknesses, together with other methods (2.2–2.4).

2.1.2 International Law

Like in domestic law, textual interpretation is so pervasive in international law that doubts about its customary character seem redundant. Textual interpretation is the starting point of treaty interpretation,[1215] a treaty being, by definition, written.[1216] The determination of CIL often requires textual interpretation, as State practice and *opinio juris* are mainly reflected in verbal acts.[1217] Pursuant to the ILC's draft conclusions, treaties, resolutions of IOs, and

1214 Eg based on the drafters' intention or based on the ordinary meaning of the text at the time of its enactment. These two solutions reflect the distinction some authors draw between two types of originalism, namely intentionalism and textualism, see Letsas (n 79) 60.

1215 ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 219 f; Fatima (n 45) 83 f. Textual interpretation is mentioned in art. 31(1) and (4) VCLT.

1216 See art. 2(1)(a) VCLT.

1217 Draft conclusions 6 and 10, ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891). For a critique: Sienho (n 960) 385 f. See also Tullio Treves, 'Customary International Law', *Max Planck Encyclopedia of Public International Law* (*Online Edition*) (Oxford University Press 2008) <opil.ouplaw.com>. Treves considers that custom cannot be interpreted because interpretation, he alleges, is limited to verbal acts.

auxiliary means (ie, judicial decisions and scholarship) can all be used to identify custom.[1218] Similarly, general principles of international law are primarily ascertained based on States' practice of recognition, treaties, custom,[1219] and auxiliary means.

The practice of treaty interpretation (and, most importantly, the practice of States)[1220] suggests that textual interpretation is a customary interpretative method.[1221] Only few analyses and draft conventions on treaty interpretation neglect textual interpretation.[1222] As regards CIL, decision-makers, in the vast majority of cases, rely on verbal, written acts to ascertain it.[1223] The importance of verbal acts is also reflected in the ILA's work on the issue.[1224] Such acts are further used in the few international rulings where general principles of international law are ascertained.[1225]

Several reasons explain States' duty to use textual interpretation in international law. First, this method helps respect the intentions of the lawmaking States,[1226] which the text is presumed to reflect.[1227] With regard to unwritten

1218 Draft conclusions 11 ff in ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891). On treaties as means of identification of CIL, see ILA Committee on Formation of Customary (General) International Law (n 886) 43 ff.

1219 Ottavio Quirico, 'General Principles of International Criminal Law and Their Relevance to Africa' (2011) 17 African Yearbook of International Law Online 139, 152 ff.

1220 On the practice of domestic courts, see Fatima (n 45) 83 f; Waibel, 'Principles of Treaty Interpretation: Developed for and Applied by National Courts?' (n 183) 20.

1221 See also the references to the ICJ's case law in ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 220 f. See also Institut de droit international, 'Interprétation des traités' (n 1197); Sorel and Boré-Eveno (n 1044) 817 ff.

1222 The Harvard Draft Convention on the Law of Treaties of 1935 does not expressly refer to textual inerpretation *qua* interpretative method, but mentions it in its commentary, see 'Article 19. Interpretation of Treaties' (n 121) 947 ff. See however ibid 940.

1223 See the comments submitted by the governments of El Salvador, Ireland, the United Kingdom, South Korea, and Finland at the ILC's 66th and 67th session, <legal.un.org/ilc/guide/1_13.shtml>. On English courts, see Fatima (n 45) 414 ff. On domestic courts in continental Europe, see Jan Wouters, 'Customary International Law Before National Courts: Some Reflections From a Continental European Perspective' (2004) 4 Non-State Actors and International Law 25, 28 ff.

1224 ILA Committee on Formation of Customary (General) International Law (n 886) 14 f.

1225 ICTY (Trial Chamber I), *Prosecutor v. Dražen Erdemović*, sentencing judgment, Case No IT-96-22-T, 29 November 1996, at para 27 ff. See also ICTY (Appeals Chamber), *Prosecutor v. Dražen Erdemović*, judgment, Case No IT-96-22-A, 7 October 1997, joint and separate opinion of Judge McDonald and Judge Vohrah, para 56 ff.

1226 Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Treaty Interpretation and Other Treaty Points' (n 1006) 204.

1227 Institut de droit international, 'Interprétation des traités' (n 1197); ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 220 f.

international law as well, the use of verbal acts secures fidelity to the intentions States have expressed through these acts. Second, the text of international law is its most immediately cognizable feature (except for laws that are not easily accessible).

Of course, textual interpretation also triggers criticism. First, is there a shared ordinary meaning on the international plane? Is resort to dictionary definitions warranted in circumstances of linguistic pluralism? Has there ever been a 'meeting of the minds',[1228] save for an agreement on wording? Even if the parties' respective intentions are congruent, the text may not reflect their intentions. Yet these critiques fail to show that textual interpretation is misguided. By agreeing on the text, States accept the uncertainties of linguistic communication. Even if they leave room for imprecision and disagreement, texts remain the most practicable way for States to bind themselves.

Second, one could argue that textual interpretation is of no assistance to interpret unwritten international law. This objection is easily rebutted: it neglects the practical importance of verbal statements (and hence of textual interpretation) to ascertain custom and general principles of international law, eg via official statements and auxiliary means.

Third, there are different interpretative approaches to textual interpretation. Even if the parties use the same method, they may disagree about the way of going about it.[1229] This challenge does not defeat textual interpretation, however. It merely (and rightly) criticizes the endorsement of a specific approach to the text that does not offer compelling arguments in its support.

Lastly, textual interpretation has been criticized for disregarding non-textual features of international law.[1230] Yet this argument is only relevant if the interpreter systematically focuses on the text's ordinary meaning in priority or to the exclusion of other interpretative methods.[1231] Such a one-sided approach does not respect the interpretative methods of international law, and it would be a mistake to conflate textual interpretation and textualism (*supra*,

1228 This is suggested by Allott's description of treaties as 'disagreement[s] reduced to writing': Allott (n 1107) 43.

1229 Eg Stanley Fish, 'Response: Interpretation Is Not a Theoretical Issue' (1999) 11 Yale Journal of Law and the Humanities 509, 510 f.

1230 Andrea Bianchi, 'Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning' in Pieter HF Bekker, Rudolf Dolzer, and Michael Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press 2010).

1231 For an example of such a textualist approach to treaty interpretation, see Andrew Tutt, 'Treaty Textualism' (2014) 39 Yale Journal of International Law 283.

2.1). On this last point, criticizing the VCLT's allegedly 'textualist' flavor,[1232] or considering that it commands textualism,[1233] is misguided. The Convention was explicitly designed to allow for a flexible approach to interpretation based on different interpretative methods and, as Richard Gardiner notes, '[o]ne has to start somewhere'.[1234]

In short, it is fair to say that textual interpretation is pervasive, customary, and mandatory in international law.

2.2 *Systematic Interpretation*

2.2.1 Domestic Law

Savigny describes the 'systematic' (contextual) element as the 'inner linkage which connects all legal institutes and legal rules so as to form one unitary whole'.[1235] Context, on his account, is limited to legal acts and institutions. It does not encompass elements such as the socio-cultural milieu in which interpretation occurs. Savigny's understanding of context presupposes that the law is a unitary, coherent ('systematic') whole, and not an aggregate of legal acts that can all be interpreted in isolation.

Systematic interpretation is a common interpretative method in all jurisdictions that have adopted Savigny's four methods. It is also used in common law countries.[1236]

Several reasons warrant looking at the law's context. First, if reading the text of the law is, intuitively, the first interpretative step, paying attention to its context is the second one. A legal provision is part of a broader regulatory scheme. Even unwritten laws do not exist in a vacuum. They belong to a pattern of

1232 See famously Myres S McDougal, 'The International Law Commission's Draft Articles Upon Interpretation: Textuality Redivivus' (1967) 61 American Journal of International Law 992.

1233 JG Merrills, 'Two Approaches to Treaty Interpretation' (1969) 4 Australian Year Book of International Law 55, 78; Martin Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' (1991) 14 Boston College International and Comparative Law Review 111, 117.

1234 Gardiner (n 359) 181.

1235 von Savigny (n 761) 214.

1236 Scalia and Garner (n 1209). Another example is the 'golden rule' used in English law, see *Grey v. Pearson* (1857) 6 HL Cas 61, 106; 10ER 1216, 1234: 'in construing statutes, as well as in construing all other written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity *or inconsistence with the rest of the instrument*, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no further' (emphasis added). See also *The Interpretation of Statutes* (n 54) 7 f.

rights and duties. Second, officials must abide by the law. If judges interpret a legal act in isolation, they might violate other legal norms. Such interpretations might also impose contradictory obligations on the law's subjects.

Systematic interpretation does not come without a series of criticisms. First, it may require judges to overstep their institutional powers. If the legislature adopts two contradictory laws (as it often does, whether deliberately or not), it is arguably not for judges to step in. However, this objection can be flipped by saying that good judicial reasoning mandates predictability, clarity and, importantly, consistency.

Second, one could object on the basis that coherence is not an end in itself, and that it may not always be warranted.[1237] The need for coherence may be outweighed by other considerations, eg reliance interests or fundamental rights. Yet this objection neglects the fact that using context does not mean that context must necessarily and always prevail.

Third, one could object on the grounds that systematic interpretation is indeterminate. Should the interpretation of a given legal act cohere with the substantive area of the law to which it belongs? With the legal system as a whole?[1238] However, the fact that the proper way of achieving systematicity is controversial only shows that systematic interpretation must be accompanied by a careful justification. It does not demonstrate that striving for systematicity (however we define it) is unwarranted *per se*.

Fourth, systematicity arguably imposes a disproportionate burden on judges. Law is messy, one could argue, and it may be impossible for courts to disentangle it to secure coherence.[1239] Yet the practical difficulties of achieving coherence do not mean that coherence is not worth striving for.

To conclude, systematic interpretation is an established interpretative method in domestic law, and there are compelling reasons to call for its use.

2.2.2 International Law

Systematic (or contextual) interpretation matters on the international plane as well. Regarding treaty interpretation, art. 31(1) VCLT mandates contextual interpretation. Art. 31(2) VCLT specifies the notion of context, and art. 31(3) VCLT identifies elements to be 'taken into account, together with the context', ie, subsequent agreements (a), subsequent practice (b), and international law

1237 Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) ch 13. See also Dickson (n 78) para 3.3.

1238 On local versus global coherence, see Dickson (n 78) para 3.5.

1239 Under Swiss law, for instance, a popular vote can lead to the adoption of a constitutional norm that creates what seems like an irreconcilable tension with existing norms.

applicable to the treaty parties (c). The circumstances surrounding the conclusion of the treaty are 'supplementary means of interpretation' (art. 32 VCLT). Systematic interpretation is also relevant to identify CIL.[1240] It is required in order to examine if State practice is sufficiently coherent, constant, and general, or when treaties are used to ascertain custom. The ILC's draft conclusions on custom mention context several times,[1241] as does the ILA's project on CIL.[1242] General principles of international law must also be interpreted in a contextual fashion. While general principles identified *in foro domestico* require that interpreters go beyond the purely domestic context in which a domestic practice has developed, as they need to establish whether this practice expresses a general principle *of international law*,[1243] this domestic context cannot be ignored in the first place.[1244] General principles of international law *stricto sensu* must also be identified by considering the context in which they have emerged.

Context is regularly mentioned by States and their courts when they interpret treaties,[1245] although references to art. 31(2) and (3) VCLT are relatively rare.[1246] Context is also prominent in the Harvard Draft Convention on the Law of Treaties.[1247] The ILC has analyzed the principle of systemic integration[1248] in its report on the fragmentation of international law.[1249] Moreover,

1240 d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' (n 1191) 151 ff; Jean d'Aspremont, 'Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation Under the Guise of Norms-Resolution' in Malgosia Fitzmaurice and Panos Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Martinus Nijhoff 2013). *Contra* Philippe Sands, 'Treaty, Custom, and the Cross-Fertilization of International Law' (1998) 1 Yale Journal of International Development Law 85, 94.

1241 Draft conclusions 3(1), 6(2), 7(1), and 10(2), ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

1242 ILA Committee on Formation of Customary (General) International Law (n 886) 17. See at 9: 'The practice of the executive, legislative and judicial organs of the State is to be considered, according to the circumstances, as State practice'. See also at 21.

1243 Ellis (n 1203) 961 f.

1244 Jain (n 73) 137 ff.

1245 On the practice of English courts, see Fatima (n 45) 114 ff.

1246 For an example to the contrary regarding domestic courts' reliance on subsequent practice in treaty interpretation, see 'Article 19. Interpretation of Treaties' (n 121) 968.

1247 See art. 19(a), 'Harvard Draft Convention on the Law of Treaties' (n 1197).

1248 Art. 31(3)(c) VCLT.

1249 ILC, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Fragmentation of International Law' (n 296) paras 410–480. See also Anne van Aaken, 'Defragmentation of Public International Law Through Interpretation: A Methodological Proposal' (2009) 16 Indiana Journal of Global Legal Studies 483.

in 2018, the ILC adopted a set of draft conclusions on subsequent agreements and subsequent practice.[1250] Context is frequently mentioned in the case law of international courts. These courts refer to context both *stricto sensu* (as per art. 31(1) and (2) VCLT) and *lato sensu* (pursuant to art. 31(3) and art. 32 VCLT).[1251] Scholars also stress the importance of the interpretative context.[1252] States likewise mention context when ascertaining custom, though less frequently than in treaty interpretation.[1253] Ireland for instance, when commenting on the ILC's work on CIL, stated that 'the weight which can be given to a particular statement varies greatly depending on the circumstances in which it was made'.[1254] Regarding the use of context to ascertain general principles of international law, domestic and international practice is scarce. In some cases, however, international courts have engaged in a comprehensive contextual survey of national practices by analyzing how an issue is addressed in different legal orders.[1255]

Why require States and their courts to use context when interpreting international law? The reasons echo those in domestic law. First, contextual

1250 ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice' (2018) UN Doc A/73/10 12.

1251 See the references in Sorel and Boré-Eveno (n 1044) 817 ff. See also d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' (n 1191) 149 ff. Eg ICJ, case concerning *Oil Platforms* (*Iran v. United States*), judgment, merits, ICJ Reports 2003, 6 November 2003, 161, at 182, para 41; ICJ, case concerning the *Legal Consequences for States of the Continuous Presence of South Africa in Namibia* (*South West Africa*) *Notwithstanding Security Council Resolution 276* (*1970*), advisory opinion, ICJ Reports 1971, 21 June 1971, 16, at 31 f, para 53. On the circumstances of the conclusion of the treaty, see ICJ, case concerning *Legality of Use of Force* (*Serbia and Montenegro v. Belgium*), judgment, preliminary objections, ICJ Reports 2004, 15 December 2004, 279 (see especially at 318, para 100, and at 323 f, para 113). Evolutive interpretation, which characterizes the case law of regional human rights courts, is allowed by art. 31(3)(b) VCLT. On this issue, see Daniel Moeckli and Nigel D White, 'Treaties as "Living Instruments"' in Dino Kritsiotis and Michael Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018).

1252 Bianchi (n 1230) 41 ff.

1253 For an example in the practice of English courts, see Fatima (n 45) 419.

1254 Ireland, <legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/icil_ireland.pdf&lang=E>, at 2.

1255 See some of the examples regarding international criminal tribunals discussed by Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff 2008) 84 ff. The PCIJ and ICJ have not conducted such comparative surveys, however, see ibid 57 f.

interpretation is a matter of 'both common sense and good faith'.[1256] Several laws are applicable to a dispute, and courts must consider them all (provided, of course, that this is consistent with the court's jurisdiction and procedural law). Second, using context helps ensure that the law does not impose contradictory obligations on its addressees. The PCIJ for instance has linked the contextual element with the need to avoid 'unreasonable or absurd results'.[1257] The ICJ has even considered that context, jointly with the text, takes precedence over other interpretative methods if it allows 'mak[ing] sense [of the relevant words]'.[1258] This stands in continuity with the PCIJ's statement that context helps limit the number of possible interpretations of a given text and is 'the final test' of ordinary meaning.[1259]

In international law, context excludes the acts of one State that have not been endorsed by a sufficient number of other States.[1260] In 2014, the ICJ refused to apply art. 31(3)(a) and (b) VCLT to resolutions of the International Whaling Commission that had not been adopted with the support of all parties to the Whaling Convention.[1261] Yet in its advisory opinion on Namibia, the ICJ invoked the practice of the Security Council to support its interpretation of

1256 ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 221.

1257 PCIJ, case concerning the *Polish Postal Service in Danzig* (*Poland v. High Commissioner of the League of Nations and Free City of Danzig*), advisory opinion, PCIJ Series B No 11, 16 May 1925, 6, at 39.

1258 ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations*, advisory opinion, ICJ Reports 1950, 3 March 1950, 4, at 8. See also PCIJ, case concerning the *Polish Postal Service in Danzig* (*Poland v. High Commissioner of the League of Nations and Free City of Danzig*), advisory opinion, PCIJ Series B No 11, 16 May 1925, 6, at 39.

1259 PCIJ, *Competence of the ILO in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, advisory opinion, PCIJ Series B No 3, 12 August 1922, 8, at 23, 35.

1260 Regarding CIL, see the comments submitted by the United Kingdom, <legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/icil_uk.pdf&lang=E>, at 44 (stating that 'it would be both inappropriate and undesirable for a domestic court to make a unilateral ruling, identifying a new rule of corporate liability based on customary international law'). See however Austria, <legal.un.org/docs/?path=../ilc/sessions/67/pdfs/english/icil_austria.pdf&lang=E>, p. 20 (in favor of extending the scope of actors with the authority to contribute to the formation of CIL). For an example, see ICJ, case concerning *Sovereignty Over Pulau Ligitan and Pulau Sipadan* (*Indonesia v. Malaysia*), judgment, merits, ICJ Reports 2002, 17 December 2002, 625, at 650, para 47.

1261 ICJ, case concerning *Whaling in the Antarctic* (*Australia v. Japan; New Zealand intervening*), judgment, ICJ Reports 2014, 31 March 2014, 226, at 257, para 83. On this judgment, see d'Aspremont, 'The International Court of Justice, the Whales, and the Blurring of the Lines Between Sources and Interpretation' (n 224).

the UN Charter, in spite of the abstention of some of the Council's permanent members.[1262]

Systematic interpretation has various drawbacks. First, one might argue that context, and especially the principle of systemic integration of art. 31(3)(c) VCLT, can require judges to overstep their powers. Given the decentralized creation of international law, there are likely to be tensions between States' various rights and duties. By considering subsequent agreements and subsequent practice, judges might depart from the lawmakers' original intentions.[1263] This arguably clashes with their legal duty to obey the law.[1264] Yet as previously mentioned (*supra*, 2.2.1), this argument can be flipped, since respecting *all* applicable legal acts is precisely what this duty requires from judges.

Second, one could contend that the systematicity of international law is a normative claim that needs to be argued for.[1265] The same applies to the claim that judges should be 'architects of the consistency of the international legal order'.[1266] Yet this objection targets systematic interpretative theories (*supra*, Chapter 2, 5.1). Systematic interpretation is, *per se*, agnostic about whether international law is (or should be) a system or not.

Third, it can be argued that context, and the requirement that other related elements 'shall be taken into account'[1267] in conjunction with it, leaves ample space for indeterminacy and, potentially, for judicial cherry-picking. This statement disregards the fact that context is conceptually distinct from the 'circumstances of [...] conclusion' of the treaty (art. 32 VCLT). Art. 31(3)(c) VCLT has for example been called the 'passe-partout' of international law.[1268] However, its

1262 ICJ, case concerning the *Legal Consequences for States of the Continuous Presence of South Africa in Namibia* (*South West Africa*) *Notwithstanding Security Council Resolution 276* (*1970*), advisory opinion, ICJ Reports 1971, 21 June 1971, 16, at 22, para 22.

1263 ICJ, case concerning N*avigational and Related Rights* (*Costa Rica v. Nicaragua*), judgment, merits, ICJ Reports 2009, 13 July 2009, 213, at 242, para 64.

1264 As previously mentioned, this duty is primarily domestic, but it can also be a corollary of States' international obligations.

1265 Peter Staubach, 'The Interpretation of Unwritten International Law by Domestic Judges' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016) 120.

1266 d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' (n 1191).

1267 Art. 31(3) VCLT.

1268 Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279, 280–281.

wording does not allow courts to take any possible provision of international law into account.

Fourth, the inconsistencies that exist between a given international legal act and its context are sometimes irreconcilable. The difficulty this argument points at is not intrinsic to contextual interpretation, but is instead a result of the limitations of systematic normative theories.

In short, while contextual interpretation does not answer all interpretative questions, good reasons explain why States do and must interpret international law in its context.

2.3 *Teleological Interpretation*

2.3.1 Domestic Law

Savigny defined the law's purpose as 'the effect that the law is intended to achieve'.[1269] He considered that purposive interpretation ought to be conducted exceptionally and only 'with great caution'.[1270] Today, in civil law jurisdictions like Switzerland, purposive interpretation stands on a par with other interpretative methods. It is also used in common law jurisdictions.[1271] Some domestic judges even endorse purposive interpretative theories.[1272]

Why require that interpreters use the purpose of a legal act to interpret it? First, purposive interpretation is a way of deferring to legislative choices. If the legislature demonstrably intended a given legal act to achieve purpose X, interpreting this act by postulating that its purpose is Y disregards legislative intent. By the same token, by deferring to X, judicial decision-makers respect the law's intended purpose.

At the same time, purposive interpretation instils flexibility into the interpretative process without necessarily disregarding legislative intent. If the legislative purpose is defined at a sufficient level of generality, teleology allows taking new circumstances into account without departing from this legislative intent *lato sensu*.[1273]

1269 von Savigny (n 761) 217.

1270 See ibid 220.

1271 In the United Kingdom, for instance, the mischief rule of statutory interpretation requires that judges identify the 'mischief' that led to the enactment of a given piece of legislation in order to 'cure' it. See *The Interpretation of Statutes* (n 54) 14.

1272 Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005).

1273 Some US scholars advocate reading the drafters' intentions at a higher level of generality, eg Lessig, 'Understanding Changed Readings: Fidelity and Theory' (n 831); Lessig, 'Translating Federalism: United States v Lopez' (n 831); Sunstein, 'Five Theses on Originalism' (n 831).

Purposive interpretation is problematic in several respects. First, identifying the purpose of a legal act raises evidentiary difficulties. One challenge, in this context, is collective intentionality. What common objective did an aggregate of legislators aim for, if at all, and how can this objective be ascertained? The purpose of legal acts can be highly indeterminate, and its identification leaves ample room for disagreement. Second, in light of these evidentiary challenges, purposive interpretation can easily be criticized for being unconstrained. Given the indeterminacy of the purpose of a legal act, judges will likely be frowned upon for reading their own values in the law. One illustration of this challenge is the disagreement between Justice Chase and Justice Iredell in *Calder v. Bull* as to the weight that ought to be given to natural law arguments.[1274]

Yet the fact that purposive interpretation is not always straightforward and leaves space for interpretative discretion does not mean that it should be abandoned. Rather, teleology must be handled with care, and used jointly with other interpretative methods.

2.3.2 International Law

Purposive interpretation is also prominent in international law. It is the third method of treaty interpretation mentioned by art. 31(1) VCLT. While some authors argue that the 'object and purpose' of a treaty refer to two conceptually distinct features of the treaty, namely to its content and to the goal the parties wanted to achieve through it,[1275] this distinction has not gained any clout in international legal practice. Another provision linked to teleology is art. 31(3)(b) VCLT, which allows resorting to subsequent treaty practice (and hence to changing circumstances).[1276] Purposive interpretation is the first method mentioned in the 1935 Harvard Draft Convention on the Law of Treaties, where it is emphasized twice.[1277] It is also relevant for the ascertainment of CIL. Although the ILC's draft conclusions do not mention the notion of 'purpose', they provide that when ascertaining CIL, 'regard must be had to the overall context, *the nature of the rule*, and the particular circumstances in which the evidence in question is to be found'[1278] (emphasis added). This leaves room for

1274 *Calder v. Bull*, 3 U.S. 386 (1798).

1275 Buffard and Zemanek (n 1154) 325–326. *Contra* Hervé Ascensio, 'Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law' (2016) 31 ICSID Review 366, 370.

1276 Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Treaty Interpretation and Other Treaty Points' (n 1006) 210.

1277 Art. 19(a), 'Harvard Draft Convention on the Law of Treaties' (n 1197).

1278 Draft conclusion 3(1) in ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

teleological considerations,[1279] as the nature of an object cannot be defined without considering its purpose (and *vice versa*). The 'nature of the act' is also mentioned by the ILA as a relevant element to determine whether a given act belongs to comity, as opposed to being required by CIL.[1280] Finally, purposive interpretation comes into play to identify general principles of international law. Scholars note that extracting a general principle from domestic practices requires reflecting upon the goal these practices aim at achieving.[1281] Stephan Schill, who analyzes general principles of international investment law, argues that the purpose of a given substantive area of international law determines the material based on which such principles ought to be identified.[1282] This is confirmed by Sir Arnold McNair's often quoted statement in the *South-West Africa* case that domestic legal concepts should not be 'directly import[ed]' into international law 'lock, stock and barrel' *qua* general principles of international law. Instead, features of international law that are reminiscent of domestic legal concepts should be taken 'as an indication of policy and principles'.[1283]

The purposive element is particularly present in the practice of treaty interpretation. It is often mentioned in the Swiss case law on treaty law, for instance,[1284] and by other domestic courts.[1285] The Harvard Draft Convention on the Law of Treaties gives purposive interpretation a central place.[1286] Teleology is also frequently used by international courts to interpret treaties.[1287] It has for instance been relied upon by the PCIJ in the framework of the doctrine of implied powers of IOs,[1288] and it is frequently invoked to interpret constitutive treaties of IOs.[1289] It is also a common feature in the interpretation of

1279 See also Yves Le Bouthillier's argument pursuant to which the 'nature of the treaty', ie, the purpose for which it was concluded, is a circumstance of conclusion of the treaty as per art. 32 VCLT: Le Bouthillier (n 1185) 860.

1280 ILA Committee on Formation of Customary (General) International Law (n 886) 35.

1281 Ellis (n 1203) 959 ff.

1282 Schill (n 1204) 148.

1283 Separate opinion of Sir Arnold McNair in ICJ, case concerning the *International Status of South-West Africa*, advisory opinion, ICJ Reports 1950, 11 July 1950, 146, at 148.

1284 See the references in Besson and Ammann (n 97) 341 f.

1285 Fatima (n 45) 118 ff; Waibel, 'Principles of Treaty Interpretation: Developed for and Applied by National Courts?' (n 183) 23, 25.

1286 'Article 19. Interpretation of Treaties' (n 121) 938.

1287 Sorel and Boré-Eveno (n 1044) 832 ff.

1288 Eg PCIJ, *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer*, advisory opinion, PCIJ Series B No 13, 23 July 1926, 6, at 18.

1289 On this topic, see Denys Simon, *L'interprétation judiciaire des traités d'organisations internationales : morphologie des conventions et fonction juridictionnelle* (Pedone 1981); Brölmann (n 1205).

international human rights treaties.[1290] In this context, scholars underscore the 'visceral attachment'[1291] that some international courts, especially human rights courts such as the ECtHR[1292] or the IACtHR, show to the teleological method.[1293] States sometimes resort to purposive considerations to identify CIL. Purposive interpretation has for example been used by the BVerfG[1294] and by Swiss courts to determine CIL.[1295] Finally, teleology has been relied on with regard to general principles of international law, which must be ascertained based on the *ratio legis* of national laws and the specificities of international law.[1296]

Why use the object and purpose of international legal acts? First, this method is in line with judges' duty to obey the law. The ILC considers that purposive interpretation is required by 'both common sense and good faith',[1297] and Yves Le Bouthillier notes that it is often necessary to determine whether an interpretation leads to a 'manifestly absurd or ambiguous result' (art. 32 VCLT).[1298] Judges who, through their interpretations, defeat the purpose of a legal act, disregard the law. A treaty that mandates the unification or harmonization of an area of the law,[1299] for instance, cannot be interpreted like an international human rights treaty governed by the principle of subsidiarity, as the respective purposes of these instruments differ. Second, purposive interpretation leaves room for evolutionary interpretation (even if there is no necessary connection between them). Through teleology, judges can take evolving social needs and circumstances into account without being straightjacketed by the text's

1290 Some authors advocate applying the 'living instrument' metaphor beyond IHRL, eg Moeckli and White (n 1251).

1291 Sorel and Boré-Eveno (n 1044) 833.

1292 Eg ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, App No 61498/08 (ECHR Reports 2010), 2 March 2010, at para 127.

1293 See also ICJ, case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, advisory opinion, ICJ Reports 1951, 28 May 1951, 15, at 23 f.

1294 Staubach (n 1265) 120 f.

1295 BGer, judgment 1A.63/2002 of 9 April 2002, at 2.1.

1296 ICTY (Trial Chamber II), *Prosecutor v. Anto Furundžija*, judgment, Case No IT-95-17/1-T, 10 December 1998, para 178. See also the separate and dissenting opinion of Judge Stephen in ICTY (Appeals Chamber), *Prosecutor v. Dražen Erdemović*, judgment, Case No IT-96-22-A, 7 October 1997, para 63.

1297 ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 221.

1298 Le Bouthillier (n 1185) 850.

1299 Eg the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 12 October 1929, or the UN Convention on Contracts for the International Sale of Goods of 11 April 1980.

original textual meaning (although teleology can also be an argument for sticking to the originally envisaged purpose).

Purposive interpretation can be criticized in various respects. One weighty difficulty is the indeterminacy that often surrounds the 'enigmatic'[1300] notion of object and purpose, as many authors note in the context of the VCLT.[1301] The overall object and purpose of a treaty can be in tension with that of specific provisions. Moreover, a treaty often pursues several goals.[1302] Consequently, the way the object and purpose are interpreted is likely to be influenced by the personal views of the judicial decision-maker. The same point has been made about purposive interpretation to ascertain general principles of international law.[1303] This objection must be taken seriously: purposive interpretation must, indeed, be used with caution, and it cannot, on its own, form the basis of a judicial decision.[1304] This does not mean that teleology should be discarded altogether. Rather, judges must demonstrate that States did actually pursue a given object and purpose, ie, that teleology can be (and is) determinate.

Second, purposive interpretation is often criticized for disregarding the parties' original intent.[1305] The ECtHR for instance considers that purposive interpretation justifies that the text of the ECHR should not be interpreted in an originalist fashion, ie, based on the parties' original intent.[1306] This position is often met with skepticism on the part of States. However, purposive interpretation does not require purposivism. Moreover, the ECtHR's rationale for interpreting the European Convention in an evolutionary way is often mischaracterized. Evolutionary interpretation is, in most cases, warranted because of the so-called 'European consensus' that has formed on a given issue. Hence, it is not disconnected from States' (present) intentions, nor from States' past intentions to protect individual rights (unless this past intention is defined very narrowly). Both originalism and purposivism are normative interpretative theories that

1300 Buffard and Zemanek (n 1154).

1301 Jan Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties' (1997) 8 Finnish Yearbook of International Law 138. See the eight different uses of 'object and purpose' highlighted by David S Jonas and Thomas N Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43 Vanderbilt Journal of Transnational Law 565.

1302 For an example, see ICJ, case concerning *Kasikili/Sedudu Island* (*Botswana v. Namibia*), judgment, merits, ICJ Reports 1999, 13 December 1999, 1045, at 1074, para 45.

1303 Ellis (n 1203) 959 f.

1304 For a similar argument, see Besson and Ammann (n 97) 349.

1305 Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Treaty Interpretation and Other Treaty Points' (n 1006) 204, 207 f.

1306 On the ECtHR's approach to interpretation, see for example Letsas (n 79) 58 ff.

must be argued for. Neither of them, *per se*, precludes resorting to purposive interpretation.

To summarize, there are good reasons for considering that purposive interpretation is a customary and good interpretative method in international law, even if its advantages should not blind judicial decision-makers to its limitations.

2.4 *Historical Interpretation*

2.4.1 Domestic Law

Savigny defines historical interpretation as the reliance on the circumstances prevailing at the time a given law came into effect.[1307] Based on Savigny's work, some continental legal systems, such as the Swiss or the German legal system, distinguish between objective and subjective historical interpretation.[1308] The distinction roughly mirrors that between textualism and intentionalism in US constitutional law. In common law jurisdictions as well, historical interpretation is a well-known (though, in some States, debated) interpretative method. In the United States, originalism (and more specifically one of its subtypes, intentionalism)[1309] is a prominent interpretative theory. English courts accept the potential relevance of legislative history in ascertaining statutory law, but did not allow it before 1992.[1310] The conditions for using this method remain controversial.[1311] While most jurisdictions consider that recourse to preparatory work may be permissible, they diverge on the conditions of its use.[1312]

The main reason why judges should – at least in some circumstances – consult legislative history is that their duty to obey the law is arguably best served if they respect legislative intent. Using legislative history is an effective way of doing so.

On the other hand, the historical method is vulnerable to a number of criticisms. First, it raises evidentiary difficulties. Assuming that a reasonably homogeneous legislative intent even exists, there are different ways of ascertaining and assessing historical evidence.[1313] Yet the fact that appraising this type of

1307 von Savigny (n 761) 214.
1308 Fleischer (n 156) 404 ff.
1309 Originalism is an umbrella term that includes textualism and intentionalism. See Letsas (n 79) 60.
1310 *Pepper* (*Inspector of Taxes*) *v. Hart* [1992] UKHL 3, AC 593.
1311 On this issue, see *The Interpretation of Statutes* (n 54) 31 ff. See also Fleischer (n 156).
1312 Noting the disparity of domestic case law in this regard: 'Article 19. Interpretation of Treaties' (n 121) 958.
1313 Vermeule (n 76) 129 f.

evidence is difficult does not mean that legislative history should simply be ignored.[1314] It only means that judges must appraise it carefully.

Second, history is irrelevant when it gives no insight into the actual reasons that led the legislature to adopt a law. The English and Scottish Law Commissions have noted that legislative history is potentially unreliable because legislators, when debating a bill, primarily aim at persuading their audience.[1315] This difficulty is not exclusive to historical interpretation, however. The text too can be a skewed reflection of legislative intent. Again, the objection only leads us to recognize that judges must appraise historical evidence carefully, and that they must also rely on other methods.

Third, resorting to legislative history is arguably undemocratic, since preparatory work has not been validated by the legislative process. This objection explains why judges like Antonin Scalia reject such extraneous, non-textual evidence.[1316] Relatedly, one could argue that courts, by using legislative history, encroach upon the competences of the legislature.[1317] Yet these critiques can be flipped, as refusing to look into legislative history can lead to a departure from what was democratically decided. An inquiry into the law's ordinary meaning at the time of its enactment that ignores legislative intent (as advocated by textualists such as Scalia) might fail to yield a clear-cut solution.[1318] In such cases, legislative history may bring clarity.

In short, there are good reasons for relying on legislative history when interpreting domestic law (at least in some cases), and this method is used in many jurisdictions.

2.4.2 International Law

Historical interpretation exists in international law as well. As regards treaty interpretation, art. 32 VCLT, entitled 'supplementary means of interpretation', provides that the *travaux préparatoires*[1319] may be used to confirm a specific interpretation (a), or to avoid manifestly absurd or ambiguous results (b). This last point resembles the 'golden rule' in English statutory interpretation. The

1314 'Article 19. Interpretation of Treaties' (n 121) 958.

1315 *The Interpretation of Statutes* (n 54) 32 f.

1316 Fleischer (n 156) 424 f.

1317 *Pepper* (*Inspector of Taxes*) *v. Hart* [1992] UKHL 3, AC 593, at 606 f.

1318 According to Lord Denning, precluding judges from using legislative history is tantamount to saying that judges 'should grope about in the dark for the meaning of an Act without switching on the light'. See *Davis v. Johnson* [1979] AC 264, at 276.

1319 The circumstances of the conclusion of the treaty, which are also mentioned in art. 32 VCLT, form part of the context *lato sensu* (*supra*, 2.2.2).

ILC abstained from defining the *travaux*, as it considered that such a definition would be underinclusive.[1320] Importantly, the *travaux* must be public[1321] and reflect the parties' common intentions, not an isolated position[1322] or one that was subsequently abandoned.[1323] Many courts (including the ICJ)[1324] do not rigorously respect these conditions, however. One difficulty in this context is that CIL is not enacted through an institutionalized deliberative process like treaties.[1325] Instead, it emerges based on State practice and *opinio juris*. Yet acts providing evidence of these two constitutive elements are analogous to the *travaux*, as they shed light on the process by which a custom has emerged. The material that can be considered for this purpose is defined in the ILC's draft conclusions 6(2) and 10(2).[1326] Similar lists are found in the ILA Resolution of 2000.[1327] Evidence that only documents the practice and *opinio juris* of one (or few) States is, of course, insufficient. The requirement of publicity applies to these acts as well.[1328] Historical interpretation is also relevant to ascertain general principles of international law. General principles identified *in foro domestico* are determined based on domestic practices. This requires an understanding of how these practices have emerged.[1329]

The practice suggests that historical interpretation is, indeed, a customary interpretative method in international law. Hersch Lauterpacht noted in 1934

1320 ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 223.

1321 See ibid. See also PCIJ, case concerning the C*ompetence of the European Commission of the Danube Between Galatz and Braïla*, advisory opinion, PCIJ Series B No 14, 8 December 1927, 6, at 32.

1322 See for example ICJ, *Ambatielos Case* (*Greece v. United Kingdom*), judgment, preliminary objection, ICJ Reports 1952, 1 July 1951, 28, at 45.

1323 See the examples mentioned by Hersch Lauterpacht, 'Les travaux préparatoires et l'interprétation des traités' (1934) 48 Recueil des cours de l'Académie de droit international 799 ff. See also Ris (n 1233) 112–113.

1324 See Ris (n 1233) 133.

1325 As a matter of fact, some scholars have criticized the imbalances that this unorderly process generates. See eg Chimni (n 1193).

1326 For a critique of the forms of State practice admitted by the ILC's draft conclusions on CIL: Sienho (n 960) 385 f.

1327 ILA Committee on Formation of Customary (General) International Law (n 886) 13 ff.

1328 Art. 24 ILC Statute reads: 'The Commission shall consider ways and means for making the evidence of customary international law more readily available [...]'. See also ILC, 'Fourth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (n 294) 13 ff para 38 ff; ILC Secretariat, 'Identification of Customary International Law: Ways of Making the Evidence of Customary International Law More Readily Available' (2019) UN Doc A/CN.4/710/Rev.1.

1329 Drawing on the methods of comparative law: Ellis (n 1203) 962. See also Jain (n 73) 137 ff.

that while States diverged in their approach to the *travaux* in the context of contractual and statutory interpretation,[1330] they converged in accepting that the *travaux* could be used to interpret treaties.[1331] While this method is the most controversial of all four methods when it comes to the conditions of its application, including in international law,[1332] States have frequently relied on preparatory work for the purposes of treaty interpretation.[1333] This practice is also reflected in the Harvard Draft Convention on the Law of Treaties of 1935, pursuant to which interpreters ought to consider 'the historical background of the treaty [and] *travaux préparatoires*'.[1334] International courts have likewise relied on the *travaux*,[1335] as have arbitral tribunals.[1336] Jan Klabbers notes that 'most international lawyers will almost automatically include a discussion of preparatory works in legal argument, and will consider it vital to do so'.[1337] States also rely on historical interpretation to ascertain CIL,[1338] namely when they identify State practice and *opinio juris*.[1339] Regarding general principles of international law, courts must establish that States have recognized a general principle for a sufficient period of time. Occasionally, they have hence examined the origins and development of these principles.[1340]

1330 Lauterpacht, 'Les travaux préparatoires et l'interprétation des traités' (n 1323) 733.

1331 See ibid 743.

1332 Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (n 248) 55.

1333 Fatima (n 45) 131 ff.

1334 Art. 19(a). See 'Harvard Draft Convention on the Law of Treaties' (n 1197).

1335 Le Bouthillier (n 1185) 845; 'Article 19. Interpretation of Treaties' (n 121) 962 ff.

1336 Eg 'Article 19. Interpretation of Treaties' (n 121) 959 ff.

1337 Klabbers, 'International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?' (n 994) 268. For an empirical assessment, see Yahli Shereshevsky and Tom Noah, 'Does Exposure to Preparatory Work Affect Treaty Interpretation? An Experimental Study on International Law Students and Experts' (2017) 28 European Journal of International Law 1287.

1338 Regarding the practice of US and English courts: 'Article 19. Interpretation of Treaties' (n 121) 965.

1339 ILC, 'Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (n 294) 21 ff.

1340 *Italia Nostra v. Ministry of Cultural Heritage and Libyan Arab Jamahiriya* (*Intervening*), Appeal Judgment, Case No 3154/2008, ILDC 1138 (IT 2008), 23 June 2008, Italy; Council of State [Council of State], at 4.4; *Kiobel and Others* (*on Behalf of Kiobel and Tusima*) *v. Royal Dutch Petroleum Co and Others*, Appeal judgment, Docket No 06-4800-cv, Docket No 06-4876-cv, 623 F3d 111 (2d Cir 2010), ILDC 1552 (US 2010), 17 September 2010, United States; Court of Appeals (2nd Circuit) [2d Cir], at 43.

In domestic law,[1341] the historical approach usually[1342] stands on equal footing with other canons, but its use is sometimes assorted with caveats. In international law, the historical method can only be used if specific conditions are fulfilled. As regards treaty interpretation, art. 32 VCLT provides that the *travaux* are merely 'supplementary means of interpretation'. This supplementary character had been stressed by international courts before the adoption of the VCLT,[1343] but the point was controversial in the drafting process of the Convention.[1344] The hierarchy between art. 31 and art. 32 VCLT clashes with the phenomenology of judicial decision-making,[1345] and this hierarchy is often blurred in practice. The ICJ and PCIJ have often used preparatory work even when the conditions of art. 32 VCLT were not fulfilled.[1346] The ECtHR

1341 Hersch Lauterpacht considered that international law needed to establish 'its own rules' on this issue: Lauterpacht, 'Les travaux préparatoires et l'interprétation des traités' (n 1323) 780.

1342 See however Stéphane Beaulac, 'No More International Treaty Interpretation in Canada's Statutory Interpretation: A Question of Access to Domestic Travaux Préparatoires' in Stéphane Beaulac and Mathieu Devinat (eds), *Interpretatio non cessat : Mélanges en l'honneur de Pierre-André Côté / Essays in Honour of Pierre-André Côté* (Yvon Blais 2011).

1343 ECtHR, *Lawless v. Ireland* (*No 3*), judgment, merits, App No 332/57 (ECHR Reports Series A No 3), 1 July 1961, para 14.

1344 Some States, such as Israel, Hungary, and the United States, considered that art. 32 VCLT ought to be on the same level as the methods of art. 31. See Sorel and Boré-Eveno (n 1044) 814. Documents like the Harvard Draft Convention on the Law of Treaties give the *travaux* a more prominent role, see art. 19(a), 'Harvard Draft Convention on the Law of Treaties' (n 1197).

1345 Merrills (n 1233) 61; Le Bouthillier (n 1185) 847.

1346 ICJ, case concerning *Maritime Dispute* (*Peru v. Chile*), ICJ Reports 2014, 27 January 2014, 4, at 30, para 66; ICJ, case concerning *Sovereignty Over Pulau Ligitan and Pulau Sipadan* (*Indonesia v. Malaysia*), judgment, merits, ICJ Reports 2002, 17 December 2002, 625, at 653 ff, para 53–58; ICJ, case concerning *Avena and Other Mexican Nationals* (*Mexico v. United States*), judgment, ICJ Reports 2004, 31 March 2004, 12, at 48 f, para 86. *Contra* (although the Court's reasoning is not explicit on this issue): ICJ, case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), judgment, ICJ Reports 2007, 26 February 2007, 43, at 109 ff, para 160–165; ICJ, case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion, ICJ Reports 2004, 9 July 2004, 136, at 174 ff, para 94–101. See also PCIJ, case concerning *Article 3, Paragraph 2, of the Treaty of Lausanne* (*Frontier Between Turkey and Iraq*), advisory opinion, PCIJ Series B No 12, 21 November 1925, 6, at 22 f; PCIJ, case concerning the *s.s. 'Lotus'* (*France v. Turkey*), judgment, PCIJ 1927 Series A No 10, 7 September 1927, 4, at 16 f; ICJ, *Ambatielos Case* (*Greece v. United Kingdom*), judgment, preliminary objection, ICJ Reports 1952, 1 July 1951, 28, at 45.

has not been perfectly consistent in its practice either.[1347] Some States have also stressed the supplementary character of historical interpretation in the context of CIL.[1348]

There are compelling reasons for resorting to historical interpretation in international law, at least in some cases, as this method is arguably a way of deferring to the lawmaking States. By taking into account how an international legal norm has come about, interpreters respect its sources and, therefore, States *qua* primary lawmakers.

However, like in domestic law, the historical method has raised criticism in international law (and this partly explains its supplementary role). First, historical interpretation can be challenged for being indeterminate. Ascertaining the intentions of an aggregate of States poses significant evidentiary difficulties. Moreover, there are different methods of ascertaining legislative history, depending on whether one defends an objective or a subjective approach to legislative history.[1349] This indeterminacy creates the risk that the *travaux* will be invoked opportunistically. Some domestic courts hence only consider preparatory work deemed unequivocal. In Lord Steyn's words, '[o]nly a bull's eye counts. Nothing less will do'.[1350] The problem of indeterminacy also exists in CIL, given the range of materials that can provide evidence of State practice and *opinio juris*. Yet this objection – and the caution required in appraising the *travaux* – does not mean that historical interpretation is always indeterminate or misguided, and that it should not be taken seriously.

Second, legislative history (when it is available at all)[1351] can be irrelevant. The records of treaty negotiations, for instance, may be inaccurate or incomplete.[1352] They may not include 'last-minute negotiations, early in the morning after a sleepless night'.[1353] The ILC also affirmed that the *travaux* were often 'incomplete and misleading', which justified according them a supplementary

1347 ECtHR, *Witold Litwa v. Poland*, judgment, merits, App No 26629/95 (ECHR Reports 2000-III), 4 April 2000, at para 33–39, where the Court mentioned the *travaux* in the context of the applicable law.

1348 Ireland, <legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/icil_ireland.pdf&lang=E>, p. 4.

1349 Olivier Corten has demonstrated that the VCLT leaves room for either of these approaches, see Corten (n 247).

1350 *Effort Shipping Co. Ltd. v. Linden Management SA* (1998) AC 605, 623.

1351 Klabbers, 'International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?' (n 994) 280.

1352 Ris (n 1233) 113.

1353 Le Bouthillier (n 1185) 857.

character.[1354] As regards CIL, the positions adopted by States in the framework of IOs may be motivated by strategic considerations, and hence not be relevant for the purposes of ascertaining *opinio juris*.[1355] Yet this objection only points to the evidentiary challenges raised by historical interpretation. It does not demonstrate that historical interpretation should be abandoned.

Third, resorting to the *travaux* is arguably misguided because no agreement has yet been reached at the negotiations and drafting stage.[1356] Le Bouthillier notes that the *travaux* were given a supplementary role in the VCLT to avoid strategic conduct by the parties. Otherwise, States might have been tempted to strengthen their position in the event of future interpretative disputes by ensuring that their own view was included in the *travaux*.[1357] However, the point of resorting to legislative history is precisely to identify what led to the enactment of a given law. While not all considerations made in this context are relevant, a fair amount of them yield insights into the process by which a provision was adopted.

Fourth, a common criticism is that the use of legislative history neglects that some States who became parties to the agreement at a later stage did not participate in the drafting process. This criticism should be taken seriously. It partly justifies why historical interpretation can only *supplement* other methods, pursuant to art. 32 VCLT. On the other hand, States that become parties at a later stage must be aware of the considerations underlying the agreement that is at stake. While they can – and should – contribute to shaping future interpretations of the treaty, they must acknowledge past interpretative choices of their treaty partners.

To conclude, historical interpretation is a customary method in international law, and rightly so, even if it must be used with caution.

2.5 *The Relationship between the Various Interpretative Methods*

In the previous subsections (2.1–2.4), I have focused on four interpretative methods of international law, ie, the textual, systematic, purposive, and historical method. I have analyzed whether these methods are indeed used in practice. I have also examined whether there are good reasons for using them.

1354 ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 220.

1355 On this point, see Stephen Mathias, 'Editorial Comment – The Work of the International Law Commission on Identification of Customary International Law: A View From the Perspective of the Office of Legal Affairs' (2016) 15 Chicago Journal of International Law 17, 25.

1356 ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 220.

1357 Le Bouthillier (n 1185) 858 f.

It is fair to say that all of them are customary, and that every method has its virtues and its vices.

Interpretative methods are not a panacea: while they do contribute to the legality and quality of judicial decision-making, they do not guarantee it (*supra*, Chapter 5).[1358] Jean-Marc Sorel and Valérie Boré-Eveno close their analysis of art. 31 VCLT by stating:

> The absence of hierarchy between the different means of interpretation, their malleability, and the multiple ways of combining them, leave the door open to countless variations in this complex operation that constitutes treaty interpretation. Interpretation and legal integrity therefore at times seem antonymic, so great is the freedom left to interpreters who are left ample room to demonstrate creativity in their handling of texts.[1359]

The fact that no method guarantees legal and predictable, clear, and consistent judicial decisions does not mean that we should discard these methods. States (including courts) must use them, and for good reasons. On the other hand, all methods have drawbacks. Hence, the various methods must be used jointly, not in isolation, both in domestic and in international law.

This finding accords with domestic and international practice and scholarship. In domestic law, Friedrich Karl von Savigny states that decision-makers must use all four interpretative methods, although in some cases, it seems superfluous to explicitly mention them all.[1360] The fact that all methods must be used is also stressed by the Swiss Federal Tribunal.[1361] Similarly, in international law, one of the arbitrators' findings in the *Lake Lanoux* case was that international law 'consecrates no absolute and rigid system of interpretation'.[1362] In treaty law, for instance, the ILC deems the VCLT a 'crucible' in which all methods of the Convention are 'thrown […], and their interaction [will] give the legally relevant interpretation'.[1363] Regarding CIL, the ILC's draft conclusions

1358 Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (n 248) 53.

1359 Sorel and Boré-Eveno (n 1044) 836.

1360 von Savigny (n 761) 215.

1361 BGE 142 V 442, at 5.1.

1362 Translated from French. See case concerning *Lake Lanoux* (*Spain, France*), award of 16 November 1957, Recueil des sentences arbitrales des Nations Unies, Vol XII, 281–317, at 301, 2.

1363 ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 220.

provide that State practice and *opinio juris* must be ascertained carefully and holistically, based on various pieces of evidence.[1364] The AALCO stresses that custom must be identified 'based on a rigorous and systematic approach'.[1365] Similar remarks apply to general principles of international law.

The Swiss Federal Tribunal's 'pragmatic methodological pluralism' (*supra*, Chapter 3, 4.2.6) conforms to these requirements to the extent the Court analyzes a case exhaustively, based on all interpretative methods. However, it does not if the Court chooses its methods 'à la carte',[1366] and if its decisions only reflect one part of the argumentative picture.[1367]

3 Conclusion

In this chapter, I have argued that textual, systematic, teleological, and historical interpretation are common (and, arguably, customary) interpretative methods in both domestic and international law. They apply to all sources of international law, ie, treaty law, CIL, and general principles of international law. Specific adjustments may be required depending (*inter alia*) on the source at hand, and especially depending on the subject matter at stake.

Interpretative methods contribute to the legality of judicial interpretations of international law. They also reinforce their quality. Whether methods succeed in meeting these two goals ultimately depends on the way they are used by judges. The legality and quality of judicial reasoning are two aspects that often overlap and influence one another. While a predictable, clear, and consistent approach to interpretative methods strengthens the quality of a judicial decision and is more likely to secure its conformity with the sources of international law, an unpredictable, unclear, and inconsistent one opens the door to bad judicial reasoning and, potentially, to a disregard for the law.

In the remaining chapters, I examine how Swiss courts interpret acts stemming from various sources of international law. Chapter 7 is devoted to treaty interpretation. Chapter 8 concerns CIL and general principles of international

1364 See especially draft conclusions 3, 6, 7, and 10, ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

1365 Sienho (n 960) 382. See also, concurring: Wood (n 14) 9.

1366 Gardiner (n 359) 147.

1367 For an example, see Marc-André Renold, 'An Important Swiss Decision Relating to the International Transfer of Cultural Goods: The Swiss Supreme Court's Decision on the Giant Antique Mogul Gold Coins' (2006) 13 International Journal of Cultural Property 361, 368.

law. In the conclusion, I summarize the findings of this study, and I suggest how the practice can be improved.

By focusing on the sources of international law, my analysis can be criticized for neglecting other angles that determine how international law must be (and is) interpreted. Such angles[1368] include the law's addressees and beneficiaries, the institutional apparatus that monitors or reviews its interpretation and, perhaps most importantly, the substantive area at stake.[1369]

While these angles must undoubtedly be taken into account to understand and evaluate the domestic judicial practice of international law, such a comprehensive study is beyond the scope of this book. Although it goes without saying that States (and, therefore, their courts) must respect the idiosyncratic interpretative State practice that has developed on the international plane with regard to specific substantive regimes of international law, an in-depth analysis of these interpretative peculiarities would require a significant expansion of the scope of my study. My aim is not to provide a textbook-like overview of the Swiss judicial practice, nor is it to offer a comprehensive account of this practice based on the various acts courts routinely interpret and the regimes these acts belong to. Instead, I evaluate the legality and quality of the Swiss judicial practice overall.

Finally, it is important to reiterate that I am not developing a general theory of the legitimacy of international law, of domestic law, or of Swiss judges' interpretations thereof (see also *supra*, Introduction, section 3). However, some of the normative propositions I defend in this study can be elements of a good theory of legitimacy. Indeed, I do defend views as to how judges must decide cases. I analyze the methods Swiss judges use to interpret treaties, CIL, and general principles of international law, and I evaluate the extent to which this practice conforms to the interpretative methods of international law and constitutes predictable, clear, and consistent reasoning.

1368 A range of relevant features can be found in Besson and Ammann (n 60).

1369 On two important substantive areas in the Swiss judicial practice, namely the interpretation of the ECHR and the interpretation of the Swiss–EU Agreement on the Free Movement of Persons, see Odile Ammann, 'The European Court of Human Rights and Swiss Politics: How Does the Swiss Judge Fit In?' in Marlene Wind (ed), *International Courts and Domestic Politics* (Cambridge University Press 2018); Odile Ammann, 'La non-discrimination, principe charnière d'interprétation : l'exemple de l'art. 2 ALCP' in Samantha Besson and Andreas R Ziegler (eds), *Egalité et non-discrimination en droit international et européen / Equality and Non-Discrimination in International and European Law* (Schulthess 2014).

CHAPTER 7

Swiss Courts and Treaty Interpretation

> Those who draft Conventions, and those of us who comment upon them, would do well to remember that the canons of interpretation [...] are every bit as worthy of our efforts as the substantive rules of international law on which attention has been more liberally lavished.[1370]

> S'agissant de l'interprétation des traités, la Convention de Vienne du 23 mai 1969 sur le droit des traités (RS 0.111) pose des principes directeurs, qui sont relativement semblables aux méthodes d'interprétation valant pour les règles générales et abstraites en droit interne, au nombre desquelles figurent les traités internationaux qui, en Suisse, sont introduits dans l'ordre juridique national dès leur entrée en vigueur sur le plan du droit international (cf. ATF 135 V 339 consid. 5.3; ATF 130 I 312 consid. 4.1 p. 325). Sur le plan interne, la loi s'interprète selon sa lettre, son esprit et son but, ainsi que selon les valeurs sur lesquelles elle repose, conformément à la méthode téléologique; si la prise en compte d'éléments historiques n'est pas déterminante pour l'interprétation, cette dernière doit néanmoins s'appuyer en principe sur la volonté du législateur et sur les jugements de valeur qui la sous-tendent de manière reconnaissable (cf. ATF 135 III 20 consid. 4.4 p. 23).[1371]

1 Introduction

The law of treaties represents the great bulk of the domestic judicial practice of international law. This also applies to the Swiss practice, as empirical findings show.[1372]

1370 Foxton (n 188) 291.

1371 Swiss Federal Tribunal, BGE 136 I 290, at 2.3.2.

1372 Ammann, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (n 5).

Treaties ratified by Switzerland span a wide number of substantive areas,[1373] including IHRL, migration, diplomatic relations, copyright, civil aviation, and investment protection, and including both public and private international law.[1374] Treaties can be bilateral or multilateral. They can provide short-term answers to specific issues, or establish long-term cooperative schemes. They can generate interstate or intrastate rights and duties.

'[T]reaties', Philip Muntz reportedly said in the House of Commons in 1871, 'like piecrusts, [...] were made to be broken, and always had been broken when opportunities presented themselves to the aggrieved parties to renounce the obligations they imposed'.[1375] Due to the characteristics of international law-making and adjudication and to the frequent vagueness of international law, including treaty law, domestic courts, when they interpret treaties, may disregard the interpretative methods required by international law (on these methods, see Chapter 6, *supra*). It is also important to recall that domestic rulings provide evidence of the constitutive elements of CIL and, hence, of customary methods of treaty interpretation. Courts may therefore be tempted to (erroneously)[1376] rely on their own case law when stating what these interpretative methods require.

In this chapter, I examine the extent to which Swiss courts (i) respect the methods of treaty interpretation required by international law and (ii) interpret treaties in a predictable, clear, and consistent way.[1377] I show that their practice sometimes runs afoul of these criteria and virtues. In the concluding section of this book (*infra*, Conclusion and Recommendations), I suggest ways in which this practice must (from the perspective of international law) and should (from the perspective of good judicial reasoning) be improved.

Many of the difficulties pointed out in this chapter are not unique to the Swiss judiciary: similar problems exist in other jurisdictions. I briefly refer to this foreign practice to put the Swiss case law into perspective (*infra*, section 2). Given how laborious a study of the case law in other States would be, I mostly rely on scholarly syntheses and on the ILDC database.

1373 <www.eda.admin.ch/eda/de/home/aussenpolitik/voelkerrecht/internationale-vertraege/datenbank-staatsvertraege.html>.

1374 As previously mentioned, this study primarily focuses on public international law, while taking private international law into account (*supra*, Chapter 2, section 5).

1375 HC Deb 30 March 1871, vol 205, cols 894–976, at 927. The authorship of this quote is disputed: some attribute it to Lenin, others to Jonathan Swift.

1376 The practice of one court, to become legally authoritative on the international plane, must be part of a coherent, constant, and general practice.

1377 On these two criteria of evaluation, see *supra*, Introduction, 3.

I first provide a short (and, given the breadth of the issue, inevitably schematic) overview of domestic courts' approach to treaty interpretation in general (2). I then zoom in on Swiss courts. I expose and assess the methods they use, and the reasons they provide in support of their interpretations (3). I close with a general evaluation of their case law (4), based on the aforementioned criteria of legality and quality.

It is difficult to do justice to Swiss courts' multi-faceted practice of treaty interpretation in one chapter. I hence focus on the features of the case law that are the most prominent and problematic from the perspective of my two criteria of evaluation. I will not dwell upon the status, rank, and direct effect of treaties in the Swiss legal order. This question has been addressed in Chapter 3 (*supra*).

The present chapter takes the practice of the Swiss Federal Tribunal into account. It also includes – subject to availability – rulings of other federal and cantonal courts, ie, the Swiss Federal Administrative Court, the Swiss Federal Criminal Court, the highest courts of the cantons of Geneva, Zurich, Basel-Stadt, and Bern, and decisions of the Swiss military tribunals. (On the structure of the Swiss judiciary, see *supra*, Chapter 3, 4.1.) For the purposes of my inquiry, I relied on these courts' official websites. For the Swiss Federal Tribunal, I mainly worked with the database of rulings published in the Court's official compendium since 1954, and with its expert search mode.[1378] I also included rulings not published in the official compendium and issued since 2000.[1379] I used the advanced search function of the Swisslex database,[1380] which contains, *inter alia*, cantonal decisions published in Swiss law journals, and which makes it possible to look up decisions mentioning art. 31 f VCLT. The case law on which this chapter is based reflects the state of courts' online databases or websites in June 2019.

Apart from the case law of the Swiss Federal Tribunal, the Swiss rulings I analyze are fairly recent, either because only newer rulings are accessible online (which applies to cantonal courts), or because the institutional history

1378 I searched for terms such as 'Auslegung AND 20 Wiener AND 20 Staatsvertrag', or 'Auslegung AND 25 Staatsvertrag', which brought up citations of these keywords when the keywords were separated by at most 20 (or 25) words. In addition, I restricted the time period of my search (from 1954 to 1980, from 1980 to 1990, and from 1990 onwards), in accordance with the three phases in the Swiss case law studied in section 3.

1379 On this database, see Ammann, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (n 5). The database can be accessed at <www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>.

1380 <swisslex.ch>.

of some judicial bodies is relatively short (this concerns federal courts other than the Swiss Federal Tribunal, see *supra*, Chapter 3, 4.1.1.2–4.1.1.3). My study is hence selective, and its findings pertaining to the practice of the abovementioned Swiss courts cannot be extrapolated to the entire Swiss practice (and, of course, even less to that of domestic courts across the globe) without the necessary caveats.

2 Domestic Courts and the Methods of Treaty Interpretation

2.1 *Introductory Remarks*

In this section, my goal is two-fold. First, I determine whether domestic courts respect the interpretative methods required by international law when interpreting treaties. I also evaluate the quality of their interpretations. The two perspectives will often be intermingled. I do not to conduct a full-fledged study in comparative law. My aim is simply to put Swiss courts' practice of treaty interpretation into perspective (*infra*, 3.6).

To evaluate the legality and quality of the practice of domestic courts in various States is a daunting task. As of June 2019, the UN counted 193 Member States, and each of them is connected to other subjects of international law through an array of treaties. Instead of offering a comprehensive overview of this treaty practice, I discuss and assess its characteristics in broad brushstrokes. Moreover, I merely analyze courts' general hermeneutic approach. Reasons of scope, and the lack of detailed scholarship on the issue, preclude looking at domestic courts' use of individual methods.

For the purposes of this study, I use several scholarly syntheses. I focus on work published in 2000 or later, as it is more likely to take into account changes that have occurred in the practice across time. In most cases, the works I rely on describe a State's judicial practice in general, and not with regard to specific areas of international law.[1381] To provide an overview of

1381 Some of the analyses on which I rely concern a particular substantive area of international law, eg Sanzhuan Guo, 'Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects' (2009) 8 Chinese Journal of International Law 161; Marochkin and Popov (n 183); Izelle Du Plessis, 'Some Thoughts on the Interpretation of Tax Treaties in South Africa' (2012) 24 South African Mercantile Law Journal 31; Bernhardt Laurentius Johannes, *The Interpretation of South African Double Taxation Agreements Under International Law* (University of Pretoria 2013); Urs Linderfalk, 'When the International Lawyers Get to Be Heard: The Story of Tax Treaty Interpretation as Told in Sweden' (2016) Nordic Tax Journal 3.

domestic case law that is as geographically balanced as possible, I look at scholarship pertaining to African,[1382] Asian,[1383] European,[1384] North[1385] and South

1382 Dire Tladi, 'Interpretation of Treaties in an International Law-Friendly Framework: The Case of South Africa' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016); Dugard (n 360); Nicholas Wasonga Orago, 'The 2010 Kenyan Constitution and the Hierarchical Place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective' (2013) 13 African Human Rights Law Journal 415; Du Plessis (n 1381); Johannes (n 1381).

1383 Congyan (n 44); Sanzhuan (n 1381); Yukiko Takashiba, 'Gingerly Walking on the VCLT Frontier? Reflections From a Survey on the Interpretive Approach of the Japanese Courts to Treaties' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016); Vivek Kanwar, 'Treaty Interpretation in Indian Courts: Adherence, Coherence, and Convergence' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016); Marochkin and Popov (n 183); William E Butler, 'Russian Federation' in David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009); David Kretzmer, 'Israel' in David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009); Nihal Jayawickrama, 'India' in David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009); Bianca Karim, 'Bangladesh' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011); Jerry Z Li and Sanzhuan Guo, 'China' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011); Farshad Rahimi Dizgovin, 'Enforcement of International Treaties by Domestic Courts of Iran: New Developments' (2018) 58 Virginia Journal of International Law 227.

1384 Fatima (n 45); Anthony Aust, 'United Kingdom' in David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009); Callista Harris and Krishna Kakkaiyadi, 'Treaty Interpretation Before the Supreme Court' (2013) 2 Cambridge Journal of International and Comparative Law 113; Lily Alexandra Hands, 'From Assange to Zentai: Interpretative Conjunctions Between International and Domestic Extradition Law in Australia and the United Kingdom' (2015) 15 Oxford University Commonwealth Law Journal 223; Lech Garlicki and Małgorzata Masternak-Kubiak, 'Poland' in David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009); André Nollkaemper, 'The Netherlands' in David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009); Christian Djeffal, 'Dynamic and Evolutive Interpretation of the ECHR by Domestic Courts? An Inquiry Into the Judicial Architecture of Europe' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016); Elisabeth Handl-Petz, 'Austria' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011); Linderfalk (n 1381).

1385 Aust, Rodiles, and Staubach (n 140); Criddle (n 1141); David L Sloss, 'United States' in David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*

American,[1386] and Oceanian[1387] jurisdictions. Of course, the domestic constitutional frameworks governing the relationship between domestic and international law and other features of domestic law (*supra*, Chapter 3) explain some variations in courts' methods and create issues of comparability across jurisdictions.

My analysis is incomplete because it is largely dependent on preexisting scholarly work, to the extent this work is accessible, both linguistically and practically. Moreover, many scholars do not focus on methods of treaty interpretation.[1388] Such analyses are needed to provide a comprehensive picture of the domestic case law beyond the 'usual suspects', ie, the United States, the United Kingdom, and other dominant Western States.

Drawing parallels based on foreign scholarship, on the one hand, and Swiss rulings and doctrine (*infra*, section 3), on the other, raises issues of

(Cambridge University Press 2009); Gib van Ert, 'Canada' in David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009); Stéphane Beaulac and John H Currie, 'Canada' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011); McIntyre (n 72).

1386 Alejandro Rodiles, 'The Law and Politics of the Pro Persona Principle in Latin America' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016); José Antonio Viera Gallo Quesney and Valeria Lübbert Álvarez, 'Los tratados sobre derechos humanos en la jurisprudencia chilena' (2012) 44 Estudios Internacionales 87; Francisco José Eguiguren Praeli, 'Aplicación de los tratados internacionales sobre derechos humanos en la jurisprudencia constitucional peruana' (2003) 9 Ius et Praxis 157; Marisol Peña Torres, 'Los tratados internacionales en la jurisprudencia constitucional' (2003) 1 Estudios constitucionales 593.

1387 Donald R Rothwell, 'Australia' in David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009); Patrick Wall, 'A Marked Improvement: The High Court of Australia's Approach to Treaty Interpretation in "Macoun v Commissioner of Taxation" [2015] HCA 44' (2016) 17 Melbourne Journal of International Law 170; Alice de Jonge, 'Australia' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011); Hands (n 1384); McIntyre (n 72).

1388 Joseph Fleuren, 'The Application of Public International Law by Dutch Courts' (2010) 57 Netherlands International Law Review 245; Chilenye Nwapi, 'International Treaties in Nigerian and Canadian Courts' (2011) 19 African Journal of International and Comparative Law 38; Maripe (n 354); Andreas L Paulus, 'Germany' in David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009); Amos O Enabulele, 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?' (2009) 17 African Journal of International and Comparative Law 326.

comparability. I therefore also consulted rulings on treaty interpretation[1389] that had been reported in the ILDC database[1390] as of June 2019. I did this (to the extent possible) for the jurisdictions for which I had found relevant scholarship. My goal was not only to have at least roughly comparable units of analysis, but also to corroborate the findings of selected scholarly writings, as one or two scholarly articles are insufficient to draw meaningful conclusions on a State's overall judicial practice.

2.2 *Exposing and Evaluating the Practice*

When analyzing the domestic case law, I distinguish between jurisdictions that are parties to the VCLT (2.2.1), and those that are not (2.2.2). Indeed, although the VCLT's methods bind all States *qua* CIL, the ratification of the Convention may influence the State's judicial practice. I also identify cross-cutting trends that apply regardless of this distinction (2.2.3).

2.2.1 Courts of States That Are Parties to the VCLT

Courts in States that have ratified the VCLT usually mention, and/or acknowledge that they must apply, the Convention's methods of treaty interpretation.[1391] Gib van Ert for instance notes that the power of Canadian courts to apply these methods is 'well established and uncontroversial'.[1392] English courts have stressed that in principle, domestic law is irrelevant to interpret treaties.[1393] In Russia, the higher courts have ordered that the lower courts apply the methods of the VCLT,[1394] and the Supreme Court mentions specific methods in some of its decrees.[1395] In specific dualist States such as Canada,

1389 The search was facilitated by the 'treaty interpretation' filter and by the jurisdictional filters provided by the database.

1390 One could argue that ILDC entries are scholarly syntheses too. Yet the case summaries, which often consist in a translated or paraphrased version of the ruling, are separate from the scholarly analysis included in the entry.

1391 Rothwell (n 1387) 151 f; van Ert (n 1385) 175; Nollkaemper (n 1384) 361; Aust (n 1384) 483; de Jonge (n 1387) 40; Handl-Petz (n 1384) 84; Fatima (n 45) 81 f; Aldrin De Zilva, 'Treaty Interpretation and Australia's Pre-CGT Tax Treaties' (2002) 31 Australian Tax Review 163, 165. Though it would be excessive to cite them all here, many ILDC entries confirm this statement.

1392 van Ert (n 1385) 181.

1393 Fatima (n 45) 102 ff.

1394 Butler (n 1383) 418. See also (regarding 'the operation of treaty rules in time and space') ibid 423.

1395 See Butler (n 1383) 442. See also the Constitutional Court in *Group of Deputies of the State Duma of the Russian Federation*, Constitutional proceedings, Judgment No 21-P, ILDC 2455 (RU 2015), 14 July 2015, Russian Federation; Constitutional Court, and the judgment of the Supreme Commercial Court in *Sentyabr v. MIA Trans and LSV-Trans*

judges consider that the VCLT's methods also apply to statutes giving effect to treaty obligations.[1396]

Courts do not systematically refer to the VCLT's methods.[1397] André Nollkaemper notes that Dutch courts seldom mention them, and that they do not consider themselves bound by them.[1398] Polish courts 'do not directly invoke Article 31 of the Vienna Convention', even if they start from the ordinary meaning of a treaty provision and use many methods the VCLT prescribes.[1399] In Canada, Stéphane Beaulac and John Currie write that the Supreme Court has not cited art. 31 f VCLT for decades because the Court uses the same methods to interpret domestic law.[1400] In Japan as well, Yukiko Takashiba observes that the State's international legal duty to respect the VCLT's methods (and to respect interpretative methods in general) is not addressed in the case law.[1401] In Mexico, the Supreme Court does not consistently acknowledge the mandatory character of the VCLT's methods.[1402]

When courts cite the VCLT's methods, they rarely demonstrably follow them[1403] or provide details as to what methods they are using.[1404] Many do not dwell on their interpretative approach.[1405] Courts often apply or emphasize only specific methods, which jeopardizes the predictability, clarity, and

(*Joining*), Supervision instance, No 15497/12, ILDC 2719 (RU 2013), 23 April 2013, Russian Federation; Supreme Commercial Court.

1396 van Ert (n 1385) 176.

1397 Eg regarding Irish courts: Djeffal (n 1384) 183. On the recent practice of the High Court of Australia: Wall (n 1387) 171.

1398 Nollkaemper (n 1384) 362. For a ruling that conforms to the VCLT's methods without explicitly mentioning them, see *A v. Secretary of State for Justice*, Appeal judgment, LJN: AA8384, AWB 99/6851, JV 2000, 285, ILDC 395 (NL 2000), 26 September 2000, Netherlands; The Hague; District Court. For an explicit mention, see *Secretary of State for Finance v. X Incorporated*, Final appeal judgment, Case No 35398, LJN: AA7995, ILDC 1073 (NL 2000), BNB 2001/19, 1 November 2000, Netherlands; Supreme Court [HR].

1399 Garlicki and Masternak-Kubiak (n 1384) 387 ff. See also *Patent Office of the Republic of Poland v. BC Plc*, Final appeal judgment, II GSK 54/05, ONSAiWSA 2006/4/96, ILDC 1528 (PL 2006), 8 February 2006, Poland; Supreme Administrative Court; *Question of Law Regarding the Interpretation of Article 17(2) of the Treaty on Extradition Between the Republic of Poland and Australia*, Re, Reference to Supreme Court on Preliminary Question, I KZP 47/02, ILDC 273 (PL 2003), 19 February 2003, Poland; Supreme Court.

1400 Beaulac and Currie (n 1385) 133 f.

1401 Takashiba (n 1383) 219. See however ibid 228.

1402 Aust, Rodiles, and Staubach (n 140) 95.

1403 Kretzmer (n 1383) 298; Hands (n 1384) 231. See also the critique of the UK Supreme Court's approach to subsequent practice in Harris and Kakkaiyadi (n 1384) 117 ff.

1404 van Ert (n 1385) 180 f.

1405 Tladi (n 1382) 143 f. See also ibid 150 f.

transparency of their reasoning. They especially stress the 'primacy of the text' based on art. 31(1) VCLT,[1406] and they fall back on the text when other methods (eg history)[1407] are inconclusive. While some have deemed the *travaux* relevant, they have been prudent in appraising them.[1408] In jurisdictions with separate opinions, the judges' methodological disagreements have come to the fore.[1409] Courts tend to rely on their own precedents on treaty interpretation.[1410] They rarely conduct comprehensive analyses of foreign practice.[1411]

The sophistication of courts' approach varies from one substantive area of international law to the other.[1412] Japanese courts, for instance, are more diligent in the area of IHRL,[1413] while Canadian courts are particularly careful with regard to issues of international tax law.[1414] One possible reason for this uneven treatment is the domestic separation of powers, and the fact that in some domains, courts defer to the other branches. Moreover, cases in some substantive areas of international law are litigated by lawyers who are experts in domestic law, but not necessarily in international law (eg tax experts in cases involving DTAs).[1415] The level of detail also likely hinges on the stakes of the case, and on its degree of complexity.

More generally, the case law is uneven. As Juliette McIntyre notes with regard to the Supreme Court of Canada and the High Court of Australia, '[t]here are ebbs and flows';[1416] she shows that the case law of these two bodies 'is far from consistent, either internally or vis-à-vis each other'.[1417]

2.2.2 Courts of States That Are Not Parties to the VCLT

The practice of courts in States that have not ratified the VCLT ranges from an endorsement of the Convention's methods *qua* CIL to their utter neglect. This spectrum of attitudes even exists within the same jurisdiction.[1418] In Israel and

1406 Rothwell (n 1387) 151; de Jonge (n 1387) 40 f; Aust, Rodiles, and Staubach (n 140) 94; Harris and Kakkaiyadi (n 1384) 114 ff.
1407 van Ert (n 1385) 176.
1408 Rothwell (n 1387) 152, footnote 155; van Ert (n 1385) 176.
1409 See van Ert (n 1385) 175 ff; Kretzmer (n 1383) 295.
1410 van Ert (n 1385) 177, 180.
1411 See ibid 181.
1412 Eg Wall (n 1387) 184 f. See also Congyan (n 44) 277.
1413 Takashiba (n 1383) 227.
1414 van Ert (n 1385) 182.
1415 On tax lawyers' and international lawyers' divergent understandings of treaty interpretation, see Linderfalk (n 1381).
1416 McIntyre (n 72) 64.
1417 See ibid 63.
1418 For a decision deemed 'unusually thorough for a US appellate court', see *Ehrlich and Ehrlich v. American Airlines, Incorporated and Others*, Appeal judgment, 360 F3d 366

India, for instance, courts occasionally refer to the Convention's methods.[1419] In Iran, the judicial practice is inconsistent.[1420] Paradoxically, while Indian courts acknowledge that art. 31 ff VCLT are customary, they do not seem to view them as obligatory.[1421] In South Africa, the VCLT's methods are not explicitly endorsed.[1422] References to them are rare, even if South African courts know of their existence and occasionally mention them.[1423] In the United States, the lower courts (both state courts and federal courts) 'routinely' apply the VCLT's methods *qua* CIL, but the US Supreme Court is reluctant to do so.[1424] Scholars have shown that the US practice has evolved together with the domestic legal and political context.[1425] They have also highlighted an increasing deference of US courts to the executive over time.[1426] At the far end of the spectrum, in States such as Bangladesh, '[c]ourts do not apply the international rules of treaty interpretation and most judges are not aware of these rules'.[1427]

As already noted for States that are parties to the VCLT (*supra*, 2.2.1), the practice of domestic courts is often uneven from one area of international law to another. In India, for instance, courts have almost exclusively referred to

(2d Cir 2004), No 02-9462, ILDC 2193 (US 2004), 8 March 2004, United States; Court of Appeals (2nd Circuit) [2d Cir]. See however the predominantly purposive approach taken (on the basis of the VCLT) in *Gandara v. Bennett and Others*, Appeal judgment, 528 F3d 823 (11th Cir 2008), ILDC 2135 (US 2008), 22 May 2008, United States; Court of Appeals (11th Circuit) [11th Cir], the primarily textual approach taken in *Yapp v. Attorney General*, Appeal judgment, 26 F3d 1562 (11th Cir 1994), ILDC 2008 (US 1994), 3 August 1994, United States; Court of Appeals (11th Circuit) [11th Cir], or – according to the reporter – the Court's premature recourse to the *travaux* contrary to the conditions stated in art. 32 VCLT in *Wigley v. Hares*, Appeal judgment, 82 So.3d 932 (Fla. Dist. App. 2011), ILDC 1827 (US 2011), 27 July 2011, United States; Florida; 4th District (West Palm Beach); District Court of Appeal [Fla Dist App].

1419 Eg Kretzmer (n 1383) 295 ff; Kanwar (n 1383).

1420 Dizgovin (n 1383) 233.

1421 See Kanwar (n 1383) 244.

1422 Dugard (n 360) 464. The cases discussed by other authors do not suggest otherwise, see Du Plessis (n 1381); Johannes (n 1381).

1423 Tladi (n 1382) 145 ff.

1424 Criddle (n 1141) 434. See *Ehrlich and Ehrlich v. American Airlines, Incorporated and Others*, Appeal judgment, 360 F3d 366 (2d Cir 2004), No 02-9462, ILDC 2193 (US 2004), 8 March 2004, United States; Court of Appeals (2nd Circuit) [2d Cir]. See however *Abel v. Minister of Justice of South Africa and Others*, Initial application, Cr 5242/97, (2000) 4 All SA 63 (C), ILDC 286 (ZA 2000), 18 July 2000, South Africa; Western Cape High Court [WC-HC].

1425 Criddle (n 1141).

1426 Aust, Rodiles, and Staubach (n 140) 86 ff.

1427 Karim (n 1383) 105.

(and followed) the methods of the VCLT when interpreting DTAs.[1428] This suggests that the stakes of the case largely determine the diligence of domestic courts.

2.2.3 Cross-Cutting Trends

Regardless of whether States have ratified the VCLT or not, the case law of their courts displays some common features.

First, when courts do not refer to the VCLT's methods, their practice is sometimes in line with what the Convention requires, but not necessarily in every respect. Courts tend to prioritize some methods, while neglecting other aspects of this methodological frame. In India, for instance, courts sometimes rely on at least some of the Convention's methods.[1429] However, they generally consider the broader circumstances of the conclusion of the treaty, as well as facts loosely connected to it, beyond what art. 32 VCLT permits.[1430] Moreover, they sometimes refer to domestic legislative history, contrary to what art. 32 VCLT allows.[1431] In Japan, courts tend to use the concepts and categories of domestic law, and domestic precedents.[1432] They primarily engage in textual interpretation, sometimes to the exclusion of other methods, and without paying attention to the specificities of international lawmaking.[1433] Still, their practice sometimes conforms to the VCLT, even when they do not explicitly mention the Convention.[1434] In South Africa, the textual method is central as well, sometimes to the detriment of other methods, which are not demonstrably used.[1435] South African courts occasionally use context, but far from systematically.[1436] In Mexico and Colombia, courts rely on teleological considerations in order to justify what has been called an activist practice.[1437]

A second cross-cutting trend is that the case law is generally of uneven quality within the same jurisdiction (see 2.2.1 and 2.2.2, *supra*). As we will see, this heterogeneity can also be witnessed in the case of Switzerland (*infra*, sections 3 and 4).

1428 Kanwar (n 1383) 254 ff. For a counterexample, see ibid 262.
1429 See Kanwar (n 1383) 244. Kanwar talks about Indian courts' use of 'similar principles of treaty interpretation'.
1430 See ibid 250.
1431 See ibid.
1432 Takashiba (n 1383) 229 ff.
1433 See ibid.
1434 See ibid 233 ff.
1435 Tladi (n 1382) 144 f.
1436 See ibid 151 f.
1437 Rodiles (n 1386).

Third, as regards auxiliary means, which can be used in connection with all four interpretative methods, courts often consult materials stemming from their own jurisdiction to interpret treaties. Some judges are open to considering the decisions of foreign and international courts on treaty interpretation,[1438] but they do not necessarily follow through.[1439] Others are less willing to consider foreign and international materials.[1440]

Fourth, some courts are reluctant to apply treaties in the first place, often because domestic constitutional law constrains them.[1441] Sergei Marochkin and Vladimir Popov report that Russian courts sometimes vaguely refer to 'international treaties' without specifying the agreements that are being considered.[1442]

To conclude, the domestic case law presents a number of difficulties from the perspective of its legality and of the quality of its reasoning. The uneven level of detail of the case law is particularly problematic from the angle of legality. It also jeopardizes the predictability, clarity, and consistency of judicial reasoning. As I will show, these difficulties largely overlap with those found in the Swiss practice (*infra*, 3.6).

3 Swiss Courts and the Methods of Treaty Interpretation

What approach do Swiss courts take to treaty interpretation? What can be said about the legality and quality of their interpretations?

To answer these questions, it seems apposite to break down the case law into three temporal stages. The first period includes rulings issued before 1980. It pertains to the time during which the VCLT ('the treaty on treaties')[1443] had not come into effect due to an insufficient number of ratifications (3.1). During

1438 Eg (especially regarding international rulings) van Ert (n 1385) 183 ff. See also Dugard (n 360) 470; Tladi (n 1382) 145 f. For a consideration of the practice of other State parties, see *Ehrlich and Ehrlich v. American Airlines, Incorporated and Others*, Appeal judgment, 360 F3d 366 (2d Cir 2004), No 02-9462, ILDC 2193 (US 2004), 8 March 2004, United States; Court of Appeals (2nd Circuit) [2d Cir].

1439 *Wigley v. Hares*, Appeal judgment, ILDC 1827 (US 2011), 82 So.3d 932 (Fla. Dist. App. 2011), 27 July 2011, United States; Florida; 4th District (West Palm Beach); District Court of Appeal [Fla Dist App].

1440 Sanzhuan (n 1381) 167.

1441 Marochkin and Popov (n 183) 226, 235 ff; Enabulele (n 1388) 330 ff; Congyan (n 44) 269, 330 ff; Sanzhuan (n 1381) 165; Orago (n 1382). See however Sanzhuan (n 1381) 166.

1442 See Marochkin and Popov (n 183) 232 f.

1443 Richard D Kearney and Robert E Dalton, 'The Treaty on Treaties' (1970) 64 American Journal of International Law 495.

the second phase (1980–1990), the Convention was in force on the international plane, but had not yet been ratified by Switzerland (3.2). The third stage (1990–2016) begins with the Convention's entry into force in Switzerland, on 6 June 1990 (3.3).

After this survey of the practice, I analyze the parallels between the methods Swiss courts use to interpret treaties and written domestic laws, respectively (3.4). I also compare the practice of various Swiss courts among themselves (3.5), before studying the similarities and contrasts between the Swiss judicial practice and that of other domestic courts (3.6). Finally, I provide an overall evaluation of the practice (4).

The two first chronological stages in the Swiss practice (3.1 and 3.2) are studied based on the Swiss Federal Tribunal's case law. Other Swiss courts either did not exist at the time (which is the case for other federal courts), or do not offer online access to their case law for this period (which is the case for cantonal courts). The third period (3.3) includes the case law of the Swiss Federal Tribunal, but also that of other federal courts, selected cantonal courts, and military tribunals (Chapter 3, 4.1, *supra*). As regards the Swiss Federal Tribunal, the present chapter includes rulings published in the Court's official compendium (BGE), but also rulings outside this compendium, subject to their online availability (ie, dating from 2000 onwards).[1444]

3.1 *The Swiss Federal Tribunal and Treaty Interpretation before the VCLT's Entry into Force (1954–1980)*

The Swiss Federal Tribunal already referred to the interpretative methods of the Vienna Convention before the Convention entered into force on the international plane, in 1980.[1445] However, in this early period, the Court did not necessarily comply with all of the Convention's requirements, and it sometimes failed to provide compelling reasons for its interpretations. The case law hence displays occasional deficiencies in terms of both the legality and the quality of the Court's reasoning.

The Swiss Federal Tribunal cited art. 31 f VCLT as early as 1971, in a case pertaining to a treaty on railway transport concluded in 1858 between the Swiss Confederation, the canton of Schaffhausen, and the Grand Duchy of Baden.[1446] The case is remarkable in light of the detailed justification offered by the Court,

1444 <www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>.

1445 The VCLT was ratified by Switzerland ten years later. It entered into force in Switzerland on 6 June 1990.

1446 BGE 97 I 359, at 3.

its careful application of the various interpretative methods, and the richness of auxiliary means used. Yet the Court's approach differs, in some respects, from the methods prescribed by the Convention. Although the Court rejected the notion of 'clear meaning' and emphasized the treaty's object and purpose, it endorsed the 'primacy of the text', presumed to reflect the parties' common intentions. It considered that departing from the treaty's literal meaning was only justified if the context or the *travaux* demonstrated that the parties' intentions differed from the text.[1447] While the Court relies on many methods of the VCLT, the weight given to the various methods is idiosyncratic.

Most decisions dating from this period do not mention the Vienna Convention, although many employ the methods prescribed by art. 31 f VCLT. However, these methods, when they are used, are generally mentioned in passing, and not based on a predictable, clear, and consistent interpretative scheme,[1448] which is detrimental to the quality of the Court's reasoning. Moreover, the case law is often riddled with references to domestic legal practices and other materials that are not mandated by the methods of treaty interpretation. In the landmark *Frigerio* decision of 1968, for instance, the Court noted that treaties needed to be interpreted if their text was 'not clear' or led to absurd results, and that the *travaux* were relevant if they provided clear evidence of the intentions of the contracting States. Relying on its own case law (as it often does in treaty interpretation), the Court added that treaties were *bona fidei negotia* to be interpreted pursuant to the reliance theory ('Vertrauenstheorie') of Swiss contract law.[1449] The Court also relied on purposive and systematic interpretation,[1450] and it mentioned the subsequent practice of the Swiss government and of German and Swiss shipping companies.[1451] While the Court relies on the four methods of the Convention, it does so in response to the arguments raised by the Swiss government, rather than in application of clearly spelled out

1447 Ibid.

1448 BGE 101 Ib 160 (regarding the Swiss–US DTA of 1951); BGE 94 III 83 (regarding the treaty of 1869 on judicial jurisdiction ('Gerichtsstandsvertrag') between France and Switzerland); BGE 94 III 35 (on the Hague Convention of 1954 on Civil Procedure, and the establishment and consular agreement between Switzerland and Italy of 1868 and its Protocol of 1969); BGE 100 II 230, at 1 (regarding the 1892 Swiss–German treaty on the mutual protection of patents, design rights, and trademarks); BGE 89 I 115 (on the DTA of 1951 between Switzerland and the United States); BGE 101 Ia 533, at 5 b) (on the extradition treaty of 1900 between Switzerland and the United States); BGE 105 II 49, at 3 a) (on the Swiss–EEC Free Trade Agreement).

1449 BGE 94 I 669, at 4. See also BGE 97 I 359, at 5.

1450 BGE 94 I 669, at 4 b).

1451 Ibid, at 5.

interpretative principles. The Court's reasoning with regard to the methods of treaty interpretation is not detailed, and it is based on Swiss legal concepts and practices. Moreover, the auxiliary means the Court relies on essentially consist of Swiss legal scholarship. The (primarily textual) reasoning of *Frigerio* was reiterated in a range of other cases predating the VCLT's entry into force.[1452]

What also emerges from the case law is that the Court rarely mentions all four interpretative methods, that the level of detail of its reasoning is uneven, and that the Court's approach frequently does not satisfy the virtues of predictability, clarity, and consistency. While the Swiss Federal Tribunal's reasoning is sometimes relatively thorough,[1453] the devil is often in the details. Concerning historical interpretation, for example, the Court has noted that the negotiations leading to the conclusion of the treaty must be taken into account to the extent that they clearly reflect the intention of the contracting States.[1454] Though the Court referred to written statements of the Swiss government addressed to Germany to interpret the Swiss–German Social Security Agreement of 1964, it did not mention Germany's practice, contrary to art. 32 VCLT.[1455] Another difficulty is that the Court sometimes explicitly uses domestic legal concepts, categories, and practices, while neglecting international legal practice. In *Dal-Bosco and Walther* (1971), for instance, the Swiss Federal Tribunal invoked *Frigerio* when mentioning the principles of treaty interpretation 'applicable in Switzerland'.[1456] The Court stated that Switzerland enjoys more interpretative freedom when interpreting domestic law than with regard to treaties.[1457] Still, its approach suggests that when interpreting treaty law, it consults its own case law rather than international law.

At this early stage, one can already identify distinctive approaches taken by the Court to interpret treaties belonging to specific substantive areas of international law. The Court has for example refused to use Swiss constitutional law

1452 BGE 97 V 35, at 3; BGE 105 V 13, at 2 b); BGE 109 V 224, at 3 b); BGE 111 V 117, at 1 b); BGE 113 V 98, at 2 b). *Frigerio* has also been cited in connection with the statement that a treaty is 'a closed structure of reciprocally negotiated concessions with an inner equilibrium', see BGE 97 V 35, at 4.

1453 Eg BGE 97 I 359, at 6 a), regarding a Treaty on Rail Transport concluded between the Swiss Confederation (respectively the canton of Schaffhausen) and the Grand Duchy of Baden and dating from 1858. In this case, the Court largely endorsed Vattel's famous maxim *in claris non fit interpretatio*, even if it acknowledged its limitations (see at 3). For a critique of this maxim, see Barradas de Freitas (n 127) 35 f.

1454 BGE 90 II 121, at 2.

1455 BGE 97 V 42, at 2.

1456 BGE 97 I 389, at 13.

1457 Ibid.

to interpret the 1929 Swiss–German Convention on Enforcement ('Vollstreckungsabkommen'),[1458] and it has stressed the importance of interpreting treaties independently from domestic legal concepts and categories in the context of the Swiss–EEC Free Trade Agreement.[1459] In other cases, the Court is more willing to rely on domestic law.

It is worth noting that already in this early phase, the Swiss Federal Tribunal has applied principles of treaty interpretation to intercantonal agreements.[1460] This case law, which was confirmed in several later cases (*infra*, 3.2), suggests that the Court considers these methods to apply to legal interpretation in general, and at least outside treaty interpretation (on this issue, see Chapter 6, *supra*).

3.2 *The Swiss Federal Tribunal and Treaty Interpretation after the VCLT's Entry into Force and before Its Ratification by Switzerland (1980–1990)*

The Swiss Federal Tribunal kept mentioning the methods of the VCLT after the Convention had entered into force for its State parties in 1980, and before it came into effect in Switzerland in June 1990.[1461] However, during this period as well, the Court's use of interpretative methods frequently lacked predictability, clarity, and consistency.

During this second phase, the Court's confident, explicit endorsement of the VCLT's methods – despite Switzerland not being a party to the Convention at the time – is noteworthy. In some decisions, the Court did not even clarify that Switzerland had not ratified the VCLT, or whether the methods of the Convention reflected CIL.[1462] A decision of 1986 provides an explanation for this approach. In this case, the Court noted that Switzerland had not ratified the VCLT because it disagreed with its provisions on dispute settlement, though it approved of its other provisions. The Court concluded that VCLT provisions reflecting CIL could be applied by Swiss courts.[1463]

Many rulings dating from 1980 to 1990 do not mention the Convention, in continuity with *Frigerio*. While the Court, in most of these cases, uses many of the VCLT's methods, it does not adopt a predictable, clear, and consistent

1458 BGE 98 Ia 314, at 1.
1459 BGE 105 II 49, at 3 a).
1460 BGE 96 I 636, at 4 c); BGE 100 Ia 418, at 5.
1461 BGE 112 V 337; BGE 109 Ia 217, at 4 b) bb).
1462 BGE 110 Ib 287, at 4 (on the Swiss–Dutch DTA).
1463 BGE 112 Ia 75, at 4 b).

interpretative approach.[1464] Only a handful of decisions are of higher quality, such as a particularly detailed ruling dating from 1987 pertaining to the Warsaw Convention,[1465] or a decision of 1988 concerning the treaty on judicial jurisdiction ('Gerichtsstandsvertrag') between France and Switzerland.[1466] It is worth noting that in line with its earlier case law (*supra*, 3.1), the Swiss Federal Tribunal has applied principles of treaty interpretation to intercantonal agreements.[1467]

3.3 *Swiss Courts and Treaty Interpretation after the VCLT's Entry into Force in Switzerland (1990–2016)*

Contrary to the previous sections (*supra*, 3.1 and 3.2), which exclusively concerned the Swiss Federal Tribunal, the present section also includes the case law of other Swiss courts.[1468] Scope precludes analyzing the entire case law of the MCC available online and dating from 1915 onwards.[1469] Only decisions of the MCC dating from 2006 and later published on the website of the Swiss authorities have been taken into account.[1470]

3.3.1 The Swiss Federal Tribunal

3.3.1.1 *The Court's Interpretative Approach in General*

Since 1990, the Court has been adopting a more predictable, clear, and consistent approach to treaty interpretation and its methods. Several decisions are even remarkably detailed and thorough.[1471] However, some difficulties remain with regard to both the legality and the quality of the Court's reasoning.

One characteristic of this practice is the Court's explicit endorsement of the VCLT's methods as a reflection of CIL. The Court has noted that these methods

1464 BGE 113 Ib 276 (on the European Convention on Extradition); BGE 112 V 16 (on the social security agreement of 1969 between Turkey and Switzerland); BGE 110 V 72 (pertaining to several bilateral social security agreements).

1465 BGE 113 II 359.

1466 BGE 114 II 265, at 3.

1467 BGE 112 Ia 75, at 4; BGE 110 Ia 123, at 1. See also (on the more general applicability of international law to intercantonal agreements) BGE 106 Ib 154, at 3.

1468 This is due to the fact that this case law is accessible online for these more recent years (which applies to cantonal courts), or that these courts have been established after 1990 (this concerns federal courts other than the Swiss Federal Tribunal).

1469 <eu.alma.exlibrisgroup.com/view/delivery/41BIG_INST/12329504630001791#main-carousel>.

1470 <www.oa.admin.ch/de/entscheidungen-militaerjustiz.html>.

1471 Eg BGer, judgment 4A_65/2018 of 11 December 2018; BGE 144 III 559.

already applied *qua* CIL before being codified.[1472] According to the Court, they also govern treaties ratified by Switzerland before the adoption of the VCLT.[1473] The Court is sometimes more cautious in its formulations, eg when it considers that the VCLT is 'essentially' a codification of CIL.[1474] It is worth noting that the Court also applies the methods of the VCLT to treaties concluded between Switzerland and subjects of international law other than States, eg the UN, the ILO, and the WIPO.[1475] It has even applied them to the Swiss–Persian Treaty of Establishment of 1934.[1476] This could suggest that the Court considers that the VCLT's methods were already customary at that time. The Swiss Federal Tribunal uses the Convention's methods as legally binding guides. In (rare) cases, it has sought to demonstrate that a case had (or had not)[1477] been decided in conformity with the VCLT.[1478]

The Swiss Federal Tribunal has acknowledged that the VCLT's entry into force requires making some adjustments to the Swiss case law on treaty interpretation. One main change is that courts must ascertain the 'international' meaning of social security agreements, instead of applying concepts of Swiss social security law by analogy.[1479] Yet this alleged change does not follow from a fundamental difference between the interpretative methods of domestic and international law. Rather, it is a corollary of the idiosyncratic features of international lawmaking (on this issue, see *supra*, Chapter 5, 3.3). As a matter of fact, the Swiss Federal Tribunal has stated that the methods of the Vienna Convention are 'relatively similar to the interpretative methods that apply to general and abstract rules in domestic law'.[1480] It has also asserted that these

1472 BGE 138 II 524, at 3.1. See also BGE 141 II 447, at 4.3.1; BGer, judgment 4P.114/2006 of 7 September 2006, at 5.4.1.

1473 BGE 122 II 234, at 4 c). Examples include the Swiss–Danish DTA of 1974 (BGer, judgment 2A.239/2005 of 28 November 2005, at 3.4.1), the Free Trade Agreement between Switzerland and the EEC of 1972 (BGer, judgment 2C_907/2013 of 25 March 2014, at 2.2.7), the Convention on the Contract for the International Carriage of Goods by Road, which came into effect in Switzerland in 1970 (BGE 138 III 708, at 3.1), and the 1955 Swiss–Italian Agreement on Border and Field Traffic (BGE 138 II 524, at 3).

1474 BGE 122 II 234, at 4 c); BGer, judgment 4P.114/2006 of 7 September 2006, at 5.4.1.

1475 BGer, judgment 2P.36/2004 of 9 May 2005, at 5.6.

1476 BGer, judgment 5A_197/2007 of 31 August 2007, at 3.1 ff.

1477 BGer, judgment 2A.460/1999 of 26 April 2000, at 3 b) cc) (although the Court itself mistakenly refers to the domestic *travaux*).

1478 BGer, judgment 9C_602/2015 of 7 January 2016, at 3.4.

1479 Compare BGE 124 V 225, at 3 a), BGE 117 V 268, at 3 b), or BGE 119 V 98, at 6 a), with BGE 111 V 117, at 1 b); BGE 112 V 145, at 2 a).

1480 BGE 136 I 290, at 2.3.2. The continuity between domestic and international methods in the Swiss judicial practice is addressed in more detail in subsection 3.4 (*infra*).

methods match its own previous approach to treaty interpretation,[1481] which glosses over the fact that this earlier practice was, in most cases, unpredictable, unclear, and inconsistent in terms of the methods used (*supra*, 3.1 and 3.2). Moreover, as the present study shows, even more recent cases are not devoid of inconsistencies.

When it does refer to the interpretative methods of treaty law codified in the VCLT, the Swiss Federal Tribunal applies them to a wide range of treaties. The Court regularly notes that the Swiss–EU Agreement on the Free Movement of Persons must be interpreted pursuant to the VCLT,[1482] at least to the extent that its provisions do not contain concepts of EU law.[1483] The Court has also relied on the VCLT to justify the need to interpret the Swiss–EU Agreement independently from domestic law. Paradoxically, based on this argument, the Court closely follows the case law of the CJEU.[1484] While scope precludes addressing this issue in more detail, it is important to stress that for CJEU case law predating the signature of the Agreement, adherence to the CJEU's rulings is commanded neither by the VCLT nor by the Agreement.[1485] In some decisions pertaining to the Swiss–EU Agreement[1486] and to other treaties between Switzerland and the EU,[1487] the Court has not referred to the VCLT. These omissions are further indications that the Court's interpretative method is guided by EU law, and not by international law.

The Court has applied the VCLT's methods to the ECHR, while stressing that its characteristics as an international human rights treaty and as a 'living instrument' must influence its interpretation.[1488] It also uses the VCLT to interpret other treaties, including the Lugano Convention,[1489] the Aarhus Convention,[1490] the Swiss–US DTA[1491] and other DTAs,[1492] the Headquarters

1481 BGE 122 II 234, at 4 c); BGer, judgment 4P.114/2006 of 7 September 2006, at 5.4.1.

1482 BGE 132 V 423, at 9.5.1; BGE 135 V 339, at 5.3; BGE 138 V 258, at 5.3; BGE 139 II 393, at 4.1.1; BGE 142 II 35, at 3.2; BGer, judgment 2C_301/2016 of 19 July 2017, at 2.2.

1483 BGE 140 II 167, at 5.5.2.

1484 BGE 142 II 35, at 3.2. See also BGE 132 V 423, at 9.1, 9.2 and 9.5; BGE 136 II 65, at 3.1.

1485 Art. 16(2) of the Swiss–EU Agreement. On this issue, see Besson and Ammann (n 97). For a different view, see Benedikt Pirker, 'Zu den für die Auslegung der Bilateralen Abkommen massgeblichen Grundsätzen: Gedanken zu BGE 140 II 112 (Gerichtsdolmetscher)' (2015) 116 Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 295.

1486 BGE 140 II 460, at 4.1; BGE 136 II 5, at 3.4.

1487 BGE 138 II 536 (on the Swiss–EU Agreement on the Taxation of Savings Income).

1488 BGE 139 I 16, at 5.2.2. See also BGE 137 I 284, at 2.1.

1489 BGE 131 III 76, at 3.2; BGE 131 III 227, at 3.1.

1490 BGE 141 II 233, at 4.3.3.

1491 BGE 139 II 404, at 7.2.1.

1492 Eg BGE 143 II 136, at 5.2 (regarding the Swiss–Dutch DTA).

Agreement between the Swiss Federal Council and the Bank for International Settlements, and a related exchange of letters,[1493] the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[1494] and the Energy Charter Treaty.[1495]

While the Court's recent interpretative approach is – at least as a matter of principle – more predictable, clear, and consistent, it also displays signs of repetitiveness and superficial engagement with the various interpretative methods. Moreover, the fact that the VCLT's methods are acknowledged as customary and that they are mentioned as the starting point of interpretation does not mean that they are followed in practice.

Art. 31(1) VCLT is the most frequently quoted provision of the VCLT in the Swiss case law. The Court often neglects the fact that the 'general rule' of art. 31 is not limited to its first paragraph.[1496] While in rare cases, the Court cites art. 31 f VCLT integrally,[1497] this does not detract it from focusing on its preferred method(s) and from neglecting others.[1498] This is *a fortiori* the case when the Court merely cites art. 31(1) VCLT at the beginning of the interpretative process.[1499] When interpreting the Swiss–Persian Establishment Treaty of 1934, for instance, the Court has emphasized the purposive method.[1500] In another decision on the Swiss–Portuguese Social Security Convention of 1975, the Court stated that it had no reason to depart from the ordinary and clear meaning of the treaty.[1501] Occasionally, however, the Court has applied the different methods of the VCLT in a more predictable, clear, and consistent way,[1502] going beyond art. 31(1) VCLT to mention its paragraphs 2 and 3.[1503]

1493 BGE 140 V 385, at 4.2.

1494 BGE 138 III 520, at 5.4.

1495 BGE 141 III 495, at 3.5.1.

1496 Ibid (Energy Charter Treaty); BGE 139 II 393, at 4.1.1 (Swiss–EU Agreement on the Free Movement of Persons); BGE 131 III 76, at 3.3 (Lugano Convention); BGE 122 II 234, at 4 c) (Agreement between Switzerland and the Federal Republic of Germany on the Road between Lörrach and Weil am Rhein on Swiss Territory). See also BGer, judgment 6B_274/2009 of 16 February 2010, at 3.1.2.1 (UN Convention Against Torture).

1497 BGE 138 II 524, at 3.1 (Convention between Switzerland and Italy on border and field traffic); BGE 132 V 423, at 9.5.1 (Swiss–EU Agreement on the Free Movement of Persons); BGE 139 II 404, at 7.2.1 (interpretation of the Swiss–US DTA).

1498 BGE 138 II 524, at 4.3 (focus on object and purpose); BGer, judgment 4A_736/2011 of 11 April 2012, at 3.3 (focus on object and purpose).

1499 BGer, judgment 5A_467/2014 of 18 December 2014, at 2.3.

1500 BGer, judgment 5A_197/2007 of 31 August 2007, at 3.1 ff.

1501 BGer (Swiss Federal Insurance Court), judgment I 99/03 of 17 November 2003, at 3.2.

1502 BGer, judgment 2C_436/2011 of 13 December 2011, at 3.3 ff; BGer, judgment 2C_498/2013 of 29 April 2014, at 5.1 ff (although the Court uses, *inter alia*, the domestic *travaux*).

1503 BGer, judgment 2C_9/2016 of 22 August 2016, at 2.2 (regarding art. 31(2)(b) VCLT).

Some trends noticed for the Court's earlier case law (*supra*, 3.1 and 3.2) are still present in this recent practice. One such tendency is self-referentiality. In many rulings, the Court has relied on the Swiss practice to interpret treaties, including the practice of the Swiss authorities pertaining to the ratification of a treaty. It especially relies on the dispatch of the Federal Council, ie, the official statement issued by the federal government before the domestic parliamentary approval of a treaty.[1504] Yet the Court seems biased, in the sense that it only highlights the Swiss practice, but not that of Switzerland's treaty partners. It has for example rejected the invocation of foreign (French) legislative materials by one of the parties to a dispute.[1505] The Court also frequently relies on auxiliary means to interpret treaties. It especially uses scholarly writings and, more rarely, foreign and international judicial decisions.[1506] Only Swiss judicial decisions are often cited.[1507]

Overall, references to the VCLT's methods are more frequent in recent decades. However, the Swiss Federal Tribunal has far from systematically referred to the Vienna Convention in the context of treaty interpretation, which can be problematic from the perspective of the legality and quality of its rulings.

Some decisions that do not mention the VCLT explicitly point to some of the Convention's methods. In a case of 2016, the Court stressed the importance of interpreting the Lugano Convention independently from domestic law.[1508] While the Court did not refer to the VCLT, it stated that the four 'customary interpretative methods' had to been relied on, before applying them to the case at hand.[1509] In an earlier decision dating from 1997, the Court mentioned that the Lugano Convention had to be interpreted based on the 'classic interpretative criteria' (by which it supposedly meant the customary methods codified in the VCLT), while also accounting for 'the characteristics of a unified international legal order'.[1510]

1504 BGer, judgment 6B_274/2009 of 16 February 2010, at 3.1.2.1; BGer, judgment 2A.460/1999 of 26 April 2000, at 3 b) cc); BGer, judgment 2A.260/2000 of 21 November 2000, at 3 g); BGer, judgment 2C_498/2013 of 29 April 2014, at 5.1 ff.

1505 BGer, judgment 4A_616/2015 of 20 September 2016, at 3.2.2.

1506 BGer, judgment 6B_274/2009 of 16 February 2010, at 3.1.2.1.

1507 BGer, judgment 2C_752/2014 of 27 November 2015, at 3.3.2 (the Court also mentions the practice of the States parties to another DTA than the one at stake); BGE 144 III 368, at 3 (regarding the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations).

1508 BGE 142 III 420, at 2.3.1. See also BGE 142 III 466, at 4.2.1 and 6.1.2; BGE 135 III 185, at 3.4.1.

1509 BGE 142 III 420, at 2.3.1. See also at 2.3.2.

1510 BGE 123 III 414, at 4.

Other decisions that do not mention the Vienna Convention are less clearly in line with the Convention's methods. This is particularly problematic from the perspective of the legality of the Court's reasoning. In a decision of 1999, for instance, the Court had to interpret the Swiss–German Social Security Agreement of 1964. It did not use the VCLT but, instead, its own (primarily textual) case law on treaty interpretation,[1511] as it did in other decisions pertaining to social security agreements.[1512] Whether it failed to mention the VCLT because these agreements all predated the Vienna Convention's entry into force in Switzerland in 1990 is unclear. The primacy of the text was also applied to other treaties.[1513]

Another problematic tendency from the perspective of the Court's methods and the quality of its reasoning is that the VCLT is hardly ever mentioned in some interpretative contexts. The Court has not cited the VCLT with regard to the two UN Covenants.[1514] It has rarely used it when interpreting host State agreements,[1515] or treaties concluded under the auspices of the Council of Europe.[1516] It has also failed to mention it when interpreting the Government Procurement Agreement of the WTO.[1517] In a judgment of 2018 pertaining to the Hague Convention on the Civil Aspects of International Child Abduction, the Court cited a block of text on interpretative methods which it regularly uses in relation to the interpretation of domestic law, without referring to the VCLT.[1518]

The Court adopts distinctive approaches with regard to specific treaties, which reinforces this impression of path dependence. In connection with the Convention on the Contract for the International Carriage of Goods by Road,[1519] the TRIPS Agreement,[1520] the Hague Convention on the Protection of Minors,[1521] or the Lugano Convention,[1522] the Court has stressed the

1511 BGE 125 V 503, at 4 b).

1512 BGE 140 V 476, at 3.3.1; BGE 124 V 145, at 3 a); BGE 122 V 381, at 5.

1513 Examples include the Patent Cooperation Treaty between Switzerland and Liechtenstein (BGE 127 III 461, at 3 b), where the Tribunal applied its approach developed in the Baden Railway Transport Case, *supra*, 3.1), the European Patent Convention (BGE 117 II 480, at 2 b)), and the Lugano Convention (BGE 121 III 336, at 5 c)).

1514 BGE 126 I 240, at 2 g) (on the ICESCR).

1515 BGE 136 III 379 (no mention of the VCLT); see however BGE 140 V 385, at 4.2.

1516 BGE 133 II 136, at 5.2.1 (regarding the European Convention on Transfrontier Television); BGE 141 IV 108 (an otherwise remarkably detailed judgment regarding the Council of Europe's Convention on Cybercrime).

1517 BGE 142 II 369, at 3.

1518 BGer, judgment 5A_576/2018 of 31 July 2018, at 4.3.2.

1519 BGE 138 III 708, at 3.4.

1520 BGE 130 III 267, at 4.1.

1521 BGE 138 III 11, at 5.1.

1522 BGE 129 III 626, at 5.2.1; BGE 124 III 436, at 2 c).

importance of limiting hermeneutic divergence and of fostering uniform interpretation. With regard to specific treaties, such as DTAs, the Court frequently stresses States' duty to interpret treaties in good faith, and to avoid absurd or abusive interpretations.[1523]

Even relatively recent decisions do not mention the methods of the VCLT, at least not all of them, and not in a predictable, clear, and consistent way.[1524] Instead of using the VCLT, the Court – as previously emphasized – tends to rely on its own case law on treaty interpretation.[1525] This confirms the risk of circularity that exists when domestic courts interpret international law.[1526] A cluster of examples is provided by cases on the Lugano Convention, in which the Court refers to its own practice of following the CJEU's case law.[1527] The level of detail of the Court's reasoning is uneven. This may reflect an unpredictable, unclear, and inconsistent approach. Of course, it may also be due to the fact that some cases do not raise difficult interpretative issues.

While the majority of the Court's decisions issued after the Convention's entry into force in Switzerland do not mention the VCLT, some decisions, in addition to citing the Convention's methods, are particularly detailed and carefully justified.[1528] Moreover, the Court was already referring to the VCLT's methods within a few days of the Convention coming into effect in Switzerland.[1529]

3.3.1.2 *The Court's Use of the Four Interpretative Methods*

The richness of the Court's case law makes it possible to analyze its use of the four interpretative methods (*supra*, Chapter 6, section 2).

In the Court's practice, the text often limits the reach of other interpretative arguments. The presumption it establishes regarding the meaning of the treaty cannot be easily rebutted.[1530] Occasionally, the Court uses language dictionaries to ascertain the treaty text,[1531] and sometimes specialized

1523 BGer, judgment 2A.416/2005 of 4 April 2006, at 3.1; BGE 143 II 136.

1524 BGE 135 III 574, at 3; BGE 140 II 305.

1525 BGE 140 V 493, at 3.

1526 On this issue, see Besson and Ammann (n 60) 125 ff.

1527 BGE 141 III 382, at 3.3.

1528 BGE 119 V 98, and more recently: BGE 141 II 233; BGer, judgment 4A_736/2011 of 11 April 2012, at 3.3; BGer, judgments 2C_64/2013 and 2C_65/2013 of 26 September 2014, at 3.3.3 ff.

1529 BGE 116 IV 262, at b) cc), issued on 14 June 1990, eight days after the VCLT's entry into force in Switzerland.

1530 BGE 134 III 555, at 2.4 ff.

1531 BGE 122 V 381, at 5 b) (*Le Grand Robert*); BGer, judgment 2P.36/2004 of 9 May 2005, at 6.1 (*Le Nouveau Petit Robert*).

dictionaries.[1532] It regularly relies on the notion of 'clear text',[1533] which is consistent with its earlier case law (eg *supra*, 3.1) and its approach to domestic law.[1534] This notion expresses the fact that the Court has no doubt (or considers that it has no margin of appreciation) regarding the meaning of a legal norm. Yet as is well-known, clarity is the result of an evaluative judgment. Moreover, clarity (from the interpreter's perspective) does not rule out the need for interpretation (eg to explain the meaning of the law to others).[1535] The notion of 'clear text' must hence be used with parsimony, and it must be carefully justified.

The context is sometimes decisive in the Swiss Federal Tribunal's practice, especially when the Court prioritizes interpretative coherence (or even uniformity) or constancy (ie, hermeneutic continuity over time). In a case of 1996 pertaining to the Swiss–Yugoslav Social Security Agreement, for instance, the Court has, without citing the VCLT, given weight to systematic interpretation and to 'the interest in a coherent interpretation of the international treaty'.[1536] As previously mentioned, the Court rarely goes beyond citing the first paragraph of art. 31 VCLT. Still, it has occasionally referred to art. 31(2) VCLT, which defines the notion of context,[1537] and especially to art. 31(3) VCLT, which pertains to subsequent agreements, subsequent practice, and systemic integration.[1538] This last paragraph has been cited by the Court to emphasize the relevance of other treaties[1539] and of foreign judicial practice.[1540] The Court has also noted that art. 31(3)(a) VCLT can be used to reach a level of interpretative uniformity.[1541] The Court has also referred to the parties' subsequent treaty practice without expressly mentioning the VCLT.[1542] In many cases, however, subsequent agreements and subsequent practice are not prominent in the Court's case law.

1532 See the *Abacha* case, in which the Court referred to *Black's Law Dictionary*, to *Dahl's Law Dictionary*, and to the *Navarre Economic and Legal Dictionary*: BGE 129 II 268, at 3.4.1.

1533 BGE 135 II 243, at 3.2.

1534 See recently BGE 140 II 202, at 5.1.

1535 On this point, see Barradas de Freitas (n 127) 35 f.

1536 BGE 122 V 381, at 5 b).

1537 BGE 130 III 430, at 3.5.

1538 Eg BGE 141 II 233, at 4.3.4 (art. 31(3)(a) and (b) VCLT); BGE 123 I 112, at 4 d) cc) (art. 31(3)(b) and (c) VCLT).

1539 Eg BGE 131 III 227, at 3.1; BGE 128 II 305, at 3.1.

1540 BGE 138 III 708, at 3.1.

1541 BGE 130 III 267, at 4.1.

1542 Eg BGE 129 II 114, at 4.2 f; BGE 132 II 65, at 2.3.

Purposive interpretation often occupies a central place in the Court's reasoning. Among the methods prescribed by art. 31 f VCLT, the Court frequently emphasizes the treaty's object and purpose.[1543] It does so to interpret the Swiss–EU Agreement on the Free Movement of Persons, the purpose of which, according to the Swiss Federal Tribunal, is to ensure free movement 'based on the provisions in force within the European Union', and hence to guarantee an interpretation of the Agreement that is 'parallel' to the law of the EU.[1544] Yet given the difficulty of ascertaining the object and purpose of a treaty, and in light of art. 16(2) of the Agreement, the Court's approach is problematic.[1545] Teleology also played a crucial role in a high-profile case decided in 2018, which involved Russia and several Ukrainian companies, and which was linked to Russia's annexation of the Crimean peninsula.[1546] Another interesting example is a case on the New York Arbitration Convention, in which the Swiss Federal Tribunal mentioned that because the purpose of the Convention is to ensure the recognition and enforcement of foreign arbitral awards, judges must interpret this treaty in a way that is 'pragmatic, flexible, and not formalistic'.[1547] Yet to equal purposive interpretation with result-oriented reasoning is misguided and neglects the constraining effect of teleology.

The Swiss Federal Tribunal seldom refers to historical interpretation in the context of treaty interpretation. In line with its emphasis on the text, the Court has stated that the *travaux* can only be used to interpret a treaty beyond its wording if the text does not reflect the parties' intentions.[1548] When it does engage in historical interpretation, the Court, as previously mentioned, frequently refers to the practice of the Swiss authorities pertaining to the ratification of a treaty, especially to the Federal Council's dispatch.[1549] This approach is at odds with what art. 32 VCLT permits.

1543 BGE 122 II 234, at 4 d); BGE 138 II 524, at 3.1 and 4.3; BGer, judgment 4A_736/2011 of 11 April 2012, at 3.3.3.

1544 Eg BGE 140 II 364, at 5.3.

1545 On this issue, see Besson and Ammann (n 97). See also Ammann, 'La non-discrimination, principe charnière d'interprétation : l'exemple de l'art. 2 ALCP' (n 1369).

1546 BGE 144 III 559, at 4.4.5.

1547 BGE 138 III 520, at 5.4.3.

1548 BGE 135 V 339, at 5.3.

1549 Eg BGE 141 II 233, at 4.3.1; BGE 136 II 241, at 14.2, BGE 133 V 367, at 9.1, and BGE 131 V 390, at 10.1.

3.3.2 Other Federal Courts

3.3.2.1 *The Swiss Federal Administrative Court*

While the case law of the Swiss Federal Administrative Court (SFAC) is only available from 2007 onwards, it provides interesting insights into the methods of treaty interpretation. The SFAC's practice is often more detailed and comprehensive than the Swiss Federal Tribunal's, especially when the Court interprets DTAs and the so-called 2009 'UBS Agreement'[1550] between Switzerland and the United States.

Given the short timeframe over which this case law spans, a chronological categorization is unwarranted. Instead, the rulings can be classified based on whether they do or do not mention the interpretative methods of the VCLT.

A number of decisions of the SFAC do not mention the VCLT, are not based on a predictable, clear, and consistent interpretative scheme, and invoke previous judicial decisions on treaty interpretation. One example is a case of 2010 pertaining to a treaty concluded in 1974 between Switzerland and Spain on the protection of indications of source, appellations of origin, and similar appellations.[1551] In this case, the Court mentioned several interpretative methods, including context and teleology,[1552] albeit not in a systematic way. The Court almost exclusively referred to the Swiss Federal Tribunal's case law on the issue (including to cases dealing with the interpretation of other, similar agreements),[1553] in addition to citing its own previous decisions and cantonal cases.[1554]

Another case in which the Court did not refer to the VCLT pertained to UBS and a US request for administrative assistance in the framework of the Swiss–US DTA.[1555] In this case, the Court referred to the text, context, and teleology, again not in a predictable, clear, and consistent way. It also relied on Swiss case law.[1556]

Some cases that do not mention the VCLT are even more clearly at odds with what the Convention and/or high-quality judicial reasoning require. In a

1550 Agreement Between the United States and the Swiss Confederation on the Request for Information From the Internal Revenue Service of the United States Regarding UBS AG, a Corporation Established Under the Laws of the Swiss Confederation, available in English at <www.irs.gov/pub/irs-drop/us-swiss_government_agreement.pdf>.

1551 SFAC, judgment B-30/2009 of 8 April 2010. See also judgment B-1295/2015 of 22 August 2016.

1552 SFAC, judgment B-30/2009 of 8 April 2010, at 3.8.

1553 Ibid, at 3.5.

1554 Ibid, at 5.2.

1555 SFAC, judgments A-7342/2008 and A-7426/2008 of 5 March 2009, at 2.

1556 Ibid, at 4.4 f, 5.3 f.

case pertaining to the Aarhus Convention, for instance, the SFAC (contrary to what art. 32 VCLT allows) relied on the practice of the Swiss authorities concerning the ratification of a treaty.[1557] Paradoxically, it did so right before acknowledging that treaties must be interpreted independently from domestic law.[1558] Similarly, in a ruling pertaining to the 2012 Swiss–Austrian treaty on cooperation in tax matters and financial markets, the Court mentioned textual, systematic, and purposive interpretation, as well as the practice of the Swiss authorities concerning the ratification of a treaty,[1559] again contrary to what art. 32 VCLT permits (on this issue, see also *infra*). Some rulings merely cite the case law of the Swiss Federal Tribunal on treaty interpretation.[1560] In other cases, the Court refers to its own case law on the issue and to the primacy of the text.[1561] It is worth noting that in some cases that do not refer to the VCLT, the Court has mentioned the principle of auto-interpretation, which rarely appears in the Swiss practice.[1562]

In contrast with the case law of the Swiss Federal Tribunal, a great number of rulings of the SFAC mention art. 31 f VCLT and describe their content (including art. 31(2) and (3) VCLT).[1563] The vast majority of these rulings refer to the UBS Agreement and to DTAs.

The Court often notes that the VCLT codifies the customary methods of treaty interpretation,[1564] and it has even stated that these methods are 'inherent in every legal order'.[1565] Hence, according to the Court, the VCLT's methods apply to (and can be applied by)[1566] States that have not (yet) ratified

1557 SFAC, judgment A-4186/2015 of 28 January 2016, at 7.5.3.1.

1558 Ibid, at 7.5.4.1.

1559 SFAC, judgment A-7010/2015 of 19 May 2016, at 5.1 ff.

1560 SFAC, judgment B-1217/2012 of 5 September 2012, at 5.1.1.

1561 SFAC, judgment A-2744/2008 of 23 March 2010, at 3.9, with reference to judgment A-7789/2009 of 21 January 2010.

1562 SFAC, judgment C-2205/2008 of 26 May 2010, at 5.5 (on the Social Security Agreement of 1984 between Switzerland and Israel).

1563 The SFAC's official website makes it convenient to search for rulings citing art. 31 f VCLT (in addition to the fact that such rulings are easier to locate than those that do not mention art. 31 f VCLT). The website includes an index of the legal provisions cited in the Court's rulings. Contrary to what applies to the case law of the Swiss Federal Tribunal, this index is available for the Court's entire case law (<www.bvger.ch/publiws/pub/index.jsf>).

1564 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.5; SFAC, judgment A-7663/2010 of 28 April 2011 (regarding the methods of art. 31 VCLT); SFAC, judgment A-6633/2010 of 6 June 2011, at 2.2 and 4.2.3 (regarding the interpretative methods of the VCLT in general).

1565 SFAC, judgment A-6159/2010 of 10 February 2011, at 3.4.

1566 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.6.1 (with reference to the French practice).

the Convention.[1567] The Court also uses these methods to interpret treaties concluded before the VCLT's entry into force.[1568] Like the Swiss Federal Tribunal, the Court has used the methods of the VCLT in connection with treaties concluded between Switzerland and subjects of international law other than States, eg to the 1972 Free Trade Agreement between Switzerland and the EEC.[1569] The Court likewise relies on these methods to interpret the OECD Model Tax Convention and its commentaries.[1570]

Compared to the abovementioned examples, the Court is sometimes more cautious when assessing the customary character of the methods of the VCLT. It seems to consider that the VCLT has crystallized CIL, ie, that it has contributed to the emergence of customary law, and not simply codified it. The SFAC has for instance stated that the methods of the VCLT codify CIL 'in their essential content'.[1571] A particularly informative example is a case on the Treaty of Turin of 1816 in which the Court analyzed the methods of treaty interpretation. The Court cited doctrinal analyses published in the 18th, 19th, and early 20th century,[1572] and an advisory opinion of the PCIJ on the issue.[1573] It concluded that the methods of the VCLT already existed in an 'analogous, although possibly less elaborate' form in the 18th century, and when the Treaty of Turin was concluded.[1574] Another symptom of the Court's cautious appraisal of the customary character of the Convention's methods is the frequent mention of the date at which the VCLT entered into force in Switzerland,[1575] as if it were necessary to demonstrate that the methods of the Convention are indeed

1567 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.5; SFAC, judgment A-2677/2007 of 16 January 2009, at 3.2.1, 4.1.1; SFAC, judgment A-6633/2010 of 6 June 2011, at 4.2.3; SFAC, judgment C-6631/2010 of 15 June 2012, at 5.1.

1568 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.6.1; SFAC, judgment A-2708/2013 of 28 August 2013, at 3.3.1. Regarding the 1951 Refugee Convention, for instance, the Court has stated that the methods of the VCLT apply 'not directly, but *qua* expression of the general rules of international law'. See SFAC, judgment C-7063/2008 of 15 May 2009, at 3.3.1.1.

1569 SFAC, judgment A-2708/2013 of 28 August 2013, at 3.3.1.

1570 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.6.2.

1571 SFAC, judgment A-340/2015 of 28 November 2016, at 4.1.3.2; SFAC, judgment A-2677/2007 of 16 January 2009, at 3.2.2 ('in ihrem wesentlichen Gehalt'). See however ibid, at 4.1.1.

1572 SFAC, judgment A-340/2015 of 28 November 2016, at 4.1.3.4.

1573 Ibid, at 4.1.3.5.

1574 Ibid, at 4.1.3.6.

1575 SFAC, judgment A-4110/2010 of 9 May 2011, at 4.1; SFAC, judgment A-2677/2007 of 16 January 2009, at 3.2.1; SFAC, judgment A-6920/2010 of 21 September 2011, at 3.4.1; SFAC, judgment A-6262/2010 of 8 April 2011, at 3.2.

applicable to treaties ratified by Switzerland. This conclusion would already follow from their customary source.

An interesting insight is that the Court has referred to the notion of 'pragmatic methodological pluralism' (see *supra*, Chapter 3, 4.2.6) in the context of treaty interpretation.[1576] This confirms a trend that is often implicit in the practice, namely that this approach is used by Swiss courts with regard to both domestic and international law.[1577]

The SFAC often cites the methods of the VCLT to stress that treaties must be interpreted independently from domestic law. The Court has pointed this out in numerous cases (the content of which is highly repetitive) pertaining to the UBS Agreement and its Protocol.[1578] As previously noted, this does not mean that the methods of the VCLT are structurally different from those of domestic law, but only that interpreters cannot disregard the characteristics of international lawmaking. The VCLT is also mentioned when the conditions set out in art. 3(2) OECD Model Tax Convention (which specifies when courts may resort to domestic legal concepts to interpret tax treaties) do not apply.[1579] Relatedly, the Court regularly mentions the VCLT, sometimes with an emphasis on art. 26 VCLT, to stress the importance of interpreting treaties in good faith ('[frei] von Spitzfindigkeiten und Winkelzügen').[1580]

The Court has mentioned the methods of the VCLT when referring to the principle of auto-interpretation. It has done so several times in connection with the interpretation of the Swiss–US DTA,[1581] but also with regard to the Free Trade Agreement of 1972 between Switzerland and the EEC.[1582] As regards

1576 SFAC, judgment C-7063/2008 of 15 May 2009, at 3.3.1.1.

1577 In a case concerning the UBS Agreement, for instance, the Court has noted that interpretation pursuant to art. 31 VCLT is a 'unitary operation', and that the various methods are on equal footing. This is consistent with pragmatic methodological pluralism. See SFAC, judgment A-6927/2010 of 13 October 2011, at 8.1 f. See also SFAC, judgment A-6938/2010 of 14 July 2011, at 5.1.4.4; SFAC, judgment A-2866/2011 of 12 December 2011, at 4.1.

1578 SFAC, judgment A-6179/2010 of 3 March 2011, at 2.3.1. See also SFAC, judgment A-6677/2010 of 6 June 2011, at 3.2; SFAC, judgment A-7397/2010 of 19 August 2011, at 4.2; SFAC, judgment A-6941/2010 of 11 August 2011, at 4.2; SFAC, judgment A-6927/2010 of 13 October 2011, at 9.2.

1579 SFAC, judgment A-6638/2010 of 9 May 2011, at 4.1; SFAC, judgment A-3425/2010 of 11 April 2011, at 4.1; SFAC, judgment A-6944/2010 of 7 September 2011, at 8.3.3.

1580 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.5.3. The Court has also stated that this duty merely applies to the relationship between the treaty parties. See SFAC, judgment A-4013/2010 of 15 July 2010, at 8.1.

1581 SFAC, judgment A-7789/2009 of 21 January 2010, at 6.5.2. See also SFAC, judgment A-6939/2010 of 27 June 2011, at 4.3; SFAC, judgment A-6053/2010 of 10 January 2011, at 5.3; SFAC, judgment A-6792/2010 of 4 May 2011, at 6.3.

1582 SFAC, judgment A-2708/2013 of 28 August 2013, at 3.3.1.

the Swiss–EU Agreement on the Free Movement of Persons, however, the Court – like the Swiss Federal Tribunal (*supra*, 3.3.1.2) – considers that it must in principle be interpreted in 'parallel' to the CJEU's case law.[1583]

Interestingly, the Court has noted that courts are 'the primary – and probably sole – addressees' of the VCLT's methods,[1584] as they are the instances to which States and IOs have delegated the competence of settling their disputes.[1585] Strictly speaking, however, the duty bearers of art. 31 and 32 VCLT are States. Moreover, other State organs, and especially the executive, need to resort to the VCLT as well.

In rare instances, the Court has mentioned the practice of the State authorities (and especially of the courts) of Switzerland's treaty partners when interpreting treaties.[1586] In an overwhelming majority of cases, however, it primarily relies on legal scholarship and on Swiss case law (mostly its own and that of the Swiss Federal Tribunal) to underpin its statements regarding art. 31 f VCLT.[1587] Through this self-referential and even circular tendency, the Court neglects the primarily interstate nature of international lawmaking.

While many rulings refer to art. 31 f VCLT in an exhaustive fashion, the level of detail of the Court's case law on treaty interpretation is uneven. While this may be due to the fact that not every dispute raises equally salient interpretative issues, it can jeopardize the quality of judicial reasoning. The Court often cites the VCLT's provisions on interpretation *pro forma*, without subsequently applying its different methods.[1588] In some cases, however, it has been remarkably thorough when applying these methods, eg in a case pertaining to the DTA between Switzerland and Singapore,[1589] and in a case pertaining to the UBS Agreement,[1590] but also in human rights cases, eg in a ruling of 2010 on the Refugee Convention.[1591]

1583 SFAC, judgments C-4032/2014 and C-7520/2014 of 3 November 2016, at 2.3. On the problems connected to this approach, see Besson and Ammann (n 97); Ammann, 'La non-discrimination, principe charnière d'interprétation : l'exemple de l'art. 2 ALCP' (n 1369).

1584 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.5.

1585 SFAC, judgment A-1735/2011 of 21 December 2011, at 2.2.

1586 SFAC, judgment A-7789/2009 of 21 January 2010, at 6.5.2; SFAC, judgment A-6159/2010 of 10 February 2011, at 3.4.2 (which pertains to the interpretation of US constitutional law by US courts).

1587 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.5; SFAC, judgment A-2866/2011 of 12 December 2011, at 7.1.3.

1588 SFAC, judgment A-6179/2010 of 3 March 2011, at 2.3.1 ff; SFAC, judgment A-4110/2010 of 9 May 2011, at 4.1; SFAC, judgment C-7063/2008 of 15 May 2009, at 3.3.1.1 ff.

1589 SFAC, judgment A-4683/2010 of 12 May 2011, at 6.3.

1590 SFAC, judgment A-6962/2010 of 18 July 2011, at 4.4.4 ff.

1591 SFAC, judgment E-4207/2006 of 11 September 2008.

The Court adopts distinctive approaches for specific treaties. This feature of the case law is not necessarily problematic, as long as the basic interpretative methods are used, and as long as these hermeneutic peculiarities are identified based on a predictable, clear, and consistent assessment. In connection with the UBS Agreement, for instance, the Court has noted that the VCLT applies unless the treaty contains special interpretative provisions.[1592] Another example of *lex specialis* are provisions drafted based on art. 3(2) of the OECD Model Tax Convention.[1593] The Court has also noted that whether the concept of *effet utile* applies to tax treaties is disputed.[1594] The Court hereby neglects that the relevance of *effet utile* to treaty interpretation in general is controversial. The ILC explicitly refrained from including *effet utile* in the VCLT.[1595]

A related issue that is problematic from the perspective of legality and quality is that the Court's statements pertaining to the methods of art. 31 f VCLT are detailed, but highly repetitive. This suggests that the Court does not actually examine every method and its implications in every case but, instead, uncritically relies on blocks of text used in earlier cases. This tendency is corroborated by the fact that most of these detailed rulings date from 2011 and 2012 and pertain to the UBS Agreement and to DTAs concluded by Switzerland.

The SFAC's case law on treaty interpretation is prolific enough to examine how the Court approaches the four methods of treaty interpretation, regardless of whether the Court explicitly refers to the VCLT or not.

The Court considers that the text is the starting point of treaty interpretation,[1596] and that it must be interpreted 'out of itself', based on its ordinary meaning.[1597] The SFAC has occasionally relied on dictionary definitions in the context of textual interpretation.[1598] It has noted that a term's ordinary meaning does not necessarily coincide with the ordinary use of language, and that it can be based on specialized terminology.[1599] The use of a term in the legal

1592 SFAC, judgment A-6927/2010 of 13 October 2011, at 8.1 f. On *lex specialis*, see SFAC, judgment A-7789/2009 of 21 January 2010, at 3.6.1 and 5.3; SFAC, judgment A-2866/2011 of 12 December 2011, at 4.5, 7.1.1.

1593 SFAC, judgment A-2866/2011 of 12 December 2011, at 4.5 and 7.1.1. However, according to the Court, such provisions must themselves be interpreted based on art. 31 f VCLT. See ibid, at 4.5; SFAC, judgment A-1951/2017 of 22 August 2018, at 3.2.4.

1594 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.5.2.

1595 ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 219.

1596 SFAC, judgment E-4207/2006 of 11 September 2008, at 6.2.

1597 SFAC, judgment A-8261/2010 of 15 August 2011, at 3.2; SFAC, judgment A-6962/2010 of 18 July 2011, at 4.4.5.1.

1598 SFAC, judgment A-6159/2010 of 10 February 2011, at 3.4.1.

1599 SFAC, judgment A-6053/2010 of 10 January 2011, at 6. See also SFAC, judgment A-8261/2010 of 15 August 2011, at 3.2.

orders of the treaty parties provides evidence of this ordinary meaning.[1600] While the text often limits the reach of other methods, such as teleology,[1601] the opposite is true as well, eg when the Court notes that textual interpretation should not be 'excessively formalistic' by leading to the neglect of other methods.[1602] Like the Swiss Federal Tribunal, the SFAC uses the infelicitous (*supra*, 3.3.1.2) expression of 'clear meaning'.[1603] In a large number of rulings, the Court has referred to its own case law based on which the VCLT commands a primarily textual interpretation of treaties.[1604] This shows that the Court tends to reason in a self-referential and even circular way, instead of consulting international legal practice.

The Court interprets the notion of context of art. 31(2) VCLT narrowly.[1605] It has held that the context excludes circumstances relevant to the conclusion of the treaty (art. 32 VCLT), as well as non-textual elements.[1606] This last point is unduly restrictive. According to the Court, the context encompasses the text, preamble, and appendices to the treaty, as well as any agreement that occurred between the parties when the treaty was concluded.[1607] The Court rightly considers that there is no hierarchy between art. 31(2) and art. 31(3) VCLT.[1608] Few cases deal with subsequent agreements (art. 31(3)(a) VCLT). However, in a very detailed ruling, the Court has mentioned them with regard to DTAs.[1609] Subsequent practice (art. 31(3)(b) VCLT) has been cited occasionally.[1610] Exceptionally, the Court has even gone beyond art. 31(3)(b) VCLT to refer to the practice of States that were not parties to the treaty.[1611] Regarding systemic integration (art. 31(3)(c) VCLT), the Court has noted that it includes every international legal act applicable between the parties.[1612] The Court's approach in

1600 SFAC, judgment A-6053/2010 of 10 January 2011, at 6.
1601 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.5.2.
1602 SFAC, judgment A-6962/2010 of 18 July 2011, at 4.4.7.
1603 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.7.2.
1604 SFAC, judgment A-6903/2010 of 23 March 2011, at 4.2.1.
1605 SFAC, judgment A-2866/2011 of 12 December 2011, at 4.3.
1606 SFAC, judgment A-6053/2010 of 10 January 2011, at 5.1.2.
1607 Eg a protocol or an exchange of letters. See SFAC, judgment A-7017/2010 of 16 June 2011, at 8.1.4.
1608 SFAC, judgment A-2866/2011 of 12 December 2011, at 4.3; SFAC, judgment A-6053/2010 of January 10, 2011, at 5.1.2. Art. 31(3) VCLT, according to the Court, pertains to the so-called 'external context'. See SFAC, judgment A-7789/2009 of 21 January 2010, at 3.5.4.
1609 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.7.10.
1610 SFAC, judgment E-4207/2006 of 11 September 2008, at 6.1.
1611 SFAC, judgment A-813/2010 of 7 September 2011, at 7.4.2.4.
1612 SFAC, judgment A-2866/2011 of 12 December 2011, at 4.3; SFAC, judgment A-6962/2010 of 18 July 2011, at 4.4.8. For examples of (explicit and implicit) uses of the principle

the aforementioned cases contradicts its narrow interpretation of context in connection with art. 31(2) VCLT.

The Court's attitude towards teleology displays some contradictions as well. The Court has stated that the treaty's object and purpose concerns the goals the parties intended to (and can)[1613] achieve through the treaty.[1614] Surprisingly, the SFAC considers that whether teleological considerations can be relied on in the context of purposive interpretation is disputed.[1615] The Court has held that the UBS Agreement aims at resolving a 'sovereignty conflict' between Switzerland and the United States,[1616] but also that the political circumstances of its adoption are irrelevant to determine its object and purpose.[1617] It views the treaty text (or its ordinary meaning)[1618] as a constraint on purposive interpretation,[1619] but it has highlighted a treaty's object and purpose to justify dynamic interpretations.[1620] The Court has noted that the title and preamble of the treaty can be helpful to identify its object and purpose,[1621] but also, on the other hand, that the VCLT does not clarify how the object and purpose ought to be determined.[1622] As mentioned, the Court occasionally mentions the concept of *effet utile*,[1623] although the ILC intentionally excluded it from art. 31 VCLT.

Historical interpretation is often conducted inconsistently with art. 32 VCLT. The Court sometimes conflates historical interpretation with the circumstances surrounding the treaty's conclusion.[1624] Like the Swiss Federal Tribunal, the SFAC has erroneously mentioned the practice of the Swiss authorities

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of systemic integration of art. 31(3)(c) VCLT, see also SFAC, judgment A-813/2010 of 7 September 2011, at 7.4.2.4; SFAC, judgment A-6159/2010 of 10 February 2011, at 3.4.5.2; SFAC, judgment A-4013/2010 of 15 July 2010, at 5 and 6.

1613 SFAC, judgment A-6258/2010 of 14 February 2011, at 11.1.2.

1614 The Court has stressed that DTAs do not pursue the same goal as agreements that aim at combating tax fraud. See SFAC, judgment A-6053/2010 of 10 January 2011, at 5.1.3; SFAC, judgment A-4911/2010 of 30 November 2010, at 4.1.3.

1615 SFAC, judgment A-1735/2011 of 21 December 2011, at 2.2.2.

1616 SFAC, judgment A-4013/2010 of 15 July 2010, at 8.1; SFAC, judgment A-6962/2010 of 18 July 2011, at 4.4.6.2.

1617 SFAC, judgment A-4013/2010 of 15 July 2010, at 8.1.

1618 SFAC, judgment A-6258/2010 of 14 February 2011, at 11.1.4, 11.3.5.

1619 SFAC, judgment A-8261/2010 of 15 August 2011, at 3.4.

1620 SFAC, judgment E-4207/2006 of 11 September 2008, at 6.4.2 (Refugee Convention).

1621 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.5.2; SFAC, judgment A-6053/2010 of 10 January 2011, at 5.1.3.

1622 See SFAC, judgment A-7789/2009 of 21 January 2010, at 3.5.2.

1623 SFAC, judgment C-7063/2008 of 15 May 2009, at 3.3.1.1.

1624 SFAC, judgment A-6053/2010 of 10 January 2011, at 5.1.2. See however SFAC, judgment A-4683/2010 of 12 May 2011, at 5.4.1.

pertaining to the ratification of a treaty in connection with art. 32 VCLT,[1625] although it has stressed the irrelevance of such domestic preparatory work in other cases.[1626] The Court does not strictly examine whether the conditions for resorting to the subsidiary means of art. 32 VCLT are indeed fulfilled, although it acknowledges their existence.[1627] It is worth noting that the Court takes the OECD Model Tax Convention and its commentaries into account from the perspective of art. 32 VCLT to interpret DTAs drafted based on the OECD Model Tax Convention.[1628] Moreover, in the context of the Refugee Convention, it consults the UNHCR Guidelines, again in the framework of art. 32 VCLT.[1629]

The Court's references to the VCLT cut both ways: they either highlight the advantages or the drawbacks of a given method. This confirms that all methods must be used jointly (*supra*, Chapter 6, 2.5). To illustrate, the SFAC sometimes cites the methods of the VCLT to emphasize purposive interpretation,[1630] but

1625 SFAC, judgment A-3003/2017 of 1 May 2019, at 4.1.2 (mentioning the dispatch of the Swiss Federal Council on the approval of the Swiss–French DTA); SFAC, judgment A-8400/2015 of 21 March 2016, at 6.3.1.5 (where the Court accepted the possibility to rely on the protocol of the debates and final decision of the federal parliament to ratify the Swiss–Dutch DTA under the heading of art. 32 VCLT); SFAC, judgments A-4407/2014, A-4414/2014, and A-4415/2014 of 8 December 2014, at 3.1.1 (mentioning the dispatch of the Swiss Federal Council on the approval of the Swiss–Dutch DTA); see also SFAC, judgment A-8400/2015 of 21 March 2016, at 6.3.1.5 (on the parliamentary debates on the Swiss–Dutch DTA); SFAC, judgment A-1735/2011 of 21 December 2011, at 5.4 (mentioning the dispatch of the Swiss Federal Council on the approval of the Swiss–EU Bilateral Agreements of 2004); SFAC, judgment A-4683/2010 of 12 May 2011, at 6.3.4, and SFAC, judgment A-4677/2010 of 12 May 2011, at 6.3.4 (mentioning the dispatch of the Federal Council on the approval of the DTA between Switzerland and Singapore). See also (mentioning the dispatch of the Federal Council on the approval of the Swiss–US UBS Agreement): SFAC, judgment A-6641/2010 of 11 March 2011, at 5.2.2; SFAC, judgment A-6159/2010 of 10 February 2011, at 3.3.1; SFAC, judgment A-8261/2010 of 15 August 2011, at 4.4; SFAC, judgment A-3830/2010 of 29 April 2011, at 3.4.5; SFAC, judgment A-6792/2010 of 4 May 2011, at 8.3.3.

1626 SFAC, judgment C-6631/2010 of 15 June 2012, at 5.3.

1627 SFAC, judgment A-6962/2010 of 18 July 2011, at 4.4.4.

1628 SFAC, judgment A-6537/2010 of 7 March 2012, at 3.2.4; SFAC, judgment A-7789/2009 of 21 January 2010, at 3.6.2; SFAC, judgment A-1246/2011 of 23 July 2012, at 3.3.4. See also SFAC, judgment A-813/2010 of 7 September 2011, at 7.4.2.4 (mentioning the OECD commentary and a 'Technical Explanation' pertaining to the US Model Income Tax Convention of 1996).

1629 SFAC, judgment E-4207/2006 of 11 September 2008, at 6.1.

1630 SFAC, judgment A-6179/2010 of 3 March 2011, at 2.3.2. See also SFAC, judgment A-6677/2010 of 6 June 2011, at 3.3; SFAC, judgment A-7397/2010 of 19 August 2011, at 4.3; SFAC, judgment A-6941/2010 of 11 August 2011, at 4.2; SFAC, judgment A-6680/2010 of 27 September 2011, at 4.2; SFAC, judgment A-6927/2010 of 13 October 2011, at 9.2, 10.2; SFAC, judgment A-2866/2011 of 12 December 2011, at 7.1.3.

also the limits that the text imposes on teleology.[1631] In some cases, it has emphasized systematic interpretation[1632] and, in others, its limited reach.[1633]

3.3.2.2 *The Swiss Federal Criminal Court*

Strikingly, since the beginning of its activity in 2004, the Swiss Federal Criminal Court (SFCC) has referred to the VCLT's interpretative methods only once, and very briefly.[1634] However, it has mentioned other provisions of the Convention,[1635] and it does occasionally apply treaty law,[1636] including treaties that are barely applied by other Swiss courts.[1637] Only a few cases on international law are more detailed, eg the *Nezzar* case pertaining to the law of immunities.[1638] This case is primarily of interest from the perspective of CIL (*infra*, Chapter 8, 2.2.2.2).

The Court's case law on treaty interpretation is too scarce to enable an analysis of the SFCC's use of the different interpretative methods. Moreover, the Court does not dwell on the methods it uses to interpret the law (be it

1631 SFAC, judgment A-7789/2009 of 21 January 2010, at 3.5.2.

1632 SFAC, judgment A-8358/2010 of 25 October 2011, at 8.4. Interestingly, in SFAC, judgment A-7789/2009 of 21 January 2010, at 3.5.2, the Court notes that teleological interpretation is not explicitly mentioned in art. 31 VCLT.

1633 Eg when stressing that a treaty must be interpreted independently from other treaties. See SFAC, judgment A-6927/2010 of 13 October 2011, at 8.2, 10.2.

1634 SFCC, judgment RR.2017.338 of 17 July 2018, at 3.4.1 (status as of June 2019).

1635 As of June 2019, the Court's database (<bstger.weblaw.ch/index.php?method=gesreg&f=0>) referenced 1 ruling mentioning art. 18 VCLT, 16 rulings mentioning art. 26 VCLT, 2 rulings mentioning art. 27 VCLT, and 2 rulings mentioning art. 30 VCLT. Many of these rulings are repetitive (ie, they reiterate what has already been said in a previous decision).

1636 According to the Court's official website, the Court has applied 20 different international agreements since 2004 (the two versions of the Lugano Convention are counted as one agreement, as well as the Swiss–US Agreement on Mutual Legal Assistance in Criminal Matters and its Appendix). See <bstger.weblaw.ch/index.php?method=gesreg&f=0>. The list does not include all treaties mentioned in the Court's case law, however; see for instance judgment RR.2013.229 of 16 October 2013, which mentions the UN Convention Against Corruption. Moreover, the database appears to contain errors: judgment BB.2015.17 of 6 October 2015, which deals with the Federal Act on DNA Profiles (SR 363), has been miscategorized as referring to the European Agreement Concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN Treaty, SR 0.747.208).

1637 Examples include the Geneva Conventions I, II, and III, or the European Convention on the Prevention of Terrorism. Other conventions that frequently appear in the SFCC's case law are also applied by other courts, eg the 1990 Convention of the Council of Europe on Money Laundering, which regularly appears in the case law of the Swiss Federal Tribunal.

1638 SFCC, judgment BB.2011.140 of 25 July 2012.

domestic or international). Only a few observations can be made about the Court's practice.

First, contrary to that of the Swiss Federal Tribunal and of the SFAC, the SFCC's jurisdiction is narrow. Therefore, its case law is specialized. This may explain why the judges of the SFCC do not analyze the methods of treaty interpretation. Second, when interpreting treaties, the Court frequently cites its own case law,[1639] which is in line with the self-referential practice of other federal courts. The Court also mentions the case law of other Swiss courts, especially rulings of the Swiss Federal Tribunal,[1640] and the practice of other Swiss authorities, eg the Swiss Federal Council and, more generally, the Swiss federal administration.[1641] It rarely refers to rulings of international courts.[1642] In *Nezzar*, the SFCC cited the ICRC commentary and the website of a Belgian think tank in connection with art. 3 AP II to the Geneva Conventions.[1643] The use of such materials is exceptional in the Swiss case law, and is probably due to the political sensitivity of the case. Third, the Court frequently relies on scholarly writings.[1644] While using such materials undoubtedly serves judicial economy, it may prevent a thorough engagement with the issue at stake. In *Nezzar*, for instance, the Court relied on scholarly analyses of the relationship between some provisions of domestic criminal law and other treaties ratified by Switzerland.[1645] It stated that the domestic provision created 'a conflict with the Geneva Conventions, of which Switzerland is the depositary'. It did so based on scholarly writings and on the fact that 'no scholar argue[d] otherwise',[1646] a

1639 SFCC, judgment RR.2013.229 of 16 October 2013, at 3.1 (regarding the European Convention on Extradition of 1957); SFCC, judgments RR.2011.144–148 of 26 January 2012, at 6.1 (regarding the European Convention on Mutual Assistance in Criminal Matters of 1959).

1640 SFCC, judgment RR.2013.229 of 16 October 2013, at 6.1 and 8.1 (regarding the ECHR), and at 8.4 (regarding the principle of good faith between States); SFCC, judgments RR.2011.144–148 of 26 January 2012, at 6.4.3 (regarding the European Convention on Mutual Assistance in Criminal Matters of 1959).

1641 SFCC, judgment BB.2011.140 of 25 July 2012, at 3.4 and 3.6 (regarding the implementation of the ICC Statute), and 5.3 (regarding the VCDR).

1642 SFCC, judgment RR.2013.229 of 16 October 2013, at 8.3, and SFCC, judgment RR.2009.163 of 22 July 2009, at 3.6 (citing the case law of the ECtHR on the ECHR); SFCC, judgment BB.2011.140 of 25 July 2012, at 3.5 (regarding the case law of the ICJ, used in connection with the interpretation of art. 3 AP II).

1643 SFCC, judgment BB.2011.140 of 25 July 2012, at 3.5.

1644 SFCC, judgment RR.2013.229 of 16 October 2013, at 3.1 (regarding the European Convention on Extradition of 1957).

1645 Ie, the Genocide Convention and the Geneva Conventions. See SFCC, judgment BB.2011.140 of 25 July 2012, at 3.3.1.

1646 Ibid, at 3.3.2.

statement which fails to convince. In this case, the Court also used scholarship to interpret the VCDR[1647] and the ICC Statute.[1648]

3.3.3 Cantonal Courts

Cantonal courts have referred to the methods of the VCLT in some cases dealing with treaties. This subsection analyzes the case law of the Supreme Court of the canton of Geneva (3.3.3.1), the High Court and Administrative Court of the canton of Zurich (3.3.3.2), the Court of Appeals of the canton of Basel-Stadt (3.3.3.3), and the High Court and Administrative Court of the canton of Bern (3.3.3.4) (on the reasons for this focus, see *supra*, Chapter 3, 4.1.2). Relevant case law is scarce (though not as meagre as that of the SFCC, for instance, see *supra*, 3.3.2.2), which makes it difficult to assess how these courts use the methods of treaty interpretation. The following paragraphs hence merely address their overall approach.

3.3.3.1 *The Supreme Court of the Canton of Geneva*

Out of the four cantonal courts under scrutiny, it is the Supreme Court of the canton of Geneva that most frequently refers to treaty law. It mostly cites the Vienna Convention in administrative law cases. The Court's Civil, Criminal, and Constitutional Chambers never appear to cite the VCLT's methods, contrary to its Administrative Chamber and, occasionally, its Social Insurance Chamber. The Court has used the VCLT's methods to interpret DTAs, the Swiss–EU Agreement on the Free Movement of Persons, and Social Security Agreements. I analyze these three clusters of cases in turn.

The Court's approach to the methods of treaty interpretation has been particularly detailed – albeit modelled on the Swiss Federal Tribunal's case law – with regard to DTAs.[1649] The Court has referred to the case law of the Swiss Federal Tribunal to justify the applicability of the VCLT's methods.[1650] The Court rarely cites the methods of the VCLT in a predictable, clear, and consistent way.[1651] It considers the text to be the starting point of the interpretation

1647 Ibid, at 5.3.

1648 Ibid, at 5.3.5.

1649 CJ-GE, Chambre administrative, judgment ATA/434/2016 of 24 May 2016, at 5; CJ-GE, Chambre administrative, judgment ATA/270/2011 of 3 May 2011, at 6; CJ-GE, Chambre administrative, judgment ATA/238/2011 of 12 April 2011, at 10; CJ-GE, Chambre administrative, judgment ATA/328/2004 of 27 April 2004, at 5 c).

1650 CJ-GE, Chambre administrative, judgment ATA/434/2016 of 24 May 2016, at 5 a); CJ-GE, Chambre administrative, judgment ATA/270/2011 of 3 May 2011, at 6; CJ-GE, Chambre administrative, judgment ATA/238/2011 of 12 April 2011, at 10.

1651 CJ-GE, Chambre administrative, judgment ATA/270/2011 of 3 May 2011, at 6. See however CJ-GE, Chambre administrative, judgment ATA/238/2011 of 12 April 2011, at 10 ff.

of DTAs, and that the main purpose of these agreements is to avoid double taxation, as opposed to avoiding taxation altogether.[1652] The Court has also cited a Swiss scholarly treatise on the issue.[1653] Interestingly, and although this could have been avoided easily, the Court even cited this treatise in disputes where the author of the book was also the lawyer of one of the parties.[1654] The Court has sometimes relied on the Swiss Federal Tribunal's case law to determine the object and purpose of DTAs.[1655] Contrary to what art. 32 VCLT provides, the Court has referred to the Swiss *travaux* pertaining to some DTAs.[1656]

The Court regularly notes that the methods of the Vienna Convention apply to the Swiss–EU Agreement on the Free Movement of Persons, and that Swiss judges must interpret the Agreement independently from the CJEU's case law, at least when this case law was issued after the Agreement's signature by the parties (art. 16(2) of the Agreement).[1657] Despite this reference to the VCLT, the Court has not applied the Convention's methods to the Swiss–EU Agreement on the Free Movement of Persons in a predictable, clear, and consistent way.[1658] To interpret it, the Court has cited the case law of the Swiss Federal Tribunal and its own case law, as well as scholarship.[1659]

1652 CJ-GE, Chambre administrative, judgment ATA/434/2016 of 24 May 2016, at 5 c).

1653 Ibid, at 5 b). See also CJ-GE, Chambre administrative, judgment ATA/328/2004 of 27 April 2004, at 5 c).

1654 CJ-GE, Chambre administrative, judgment ATA/434/2016 of 24 May 2016, at 5 b).

1655 CJ-GE, Chambre administrative, judgment ATA/289/2000 of 9 May 2000, at 4 a).

1656 CJ-GE, Chambre administrative, judgment ATA/434/2016 of 24 May 2016, at 5 c) (regarding the Swiss–Israeli DTA of 2003); CJ-GE, Chambre administrative, judgment ATA/238/2011 of 12 April 2011, at 15 (regarding the DTA between Switzerland and the United Kingdom and Northern Ireland of 1993).

1657 CJ-GE, Chambre administrative, judgment ATA/551/2012 of 21 August 2012, at 8 b); CJ-GE, Chambre administrative, judgment ATA/43/2011 of 25 January 2011, at 9; CJ-GE, Chambre administrative, judgment ATA/633/2009 of 1 December 2009, at 11; CJ-GE, Chambre administrative, judgment ATA/152/2009 of 24 March 2009, at 23; CJ-GE, Chambre administrative, judgment ATA/23/2014 of 14 January 2014, at 9 b); CJ-GE, Chambre des assurances sociales, judgment ATAS/909/2013 of 19 Septembre 2013, at 6 d); CJ-GE, Chambre des assurances sociales, judgment ATAS/503/2014 of 10 April 2014, at 6 c).

1658 CJ-GE, Chambre administrative, judgment ATA/23/2014 of 14 January 2014, at 9 b); CJ-GE, Chambre administrative, judgment ATA/551/2012 of 21 August 2012, at 8 b).

1659 CJ-GE, Chambre administrative, judgment ATA/23/2014 of 14 January 2014, at 9 b); CJ-GE, Chambre administrative, judgment ATA/551/2012 of 21 August 2012, at 8 b); CJ-GE, Chambre administrative, judgment ATA/43/2011 of 25 January 2011, at 9 ; CJ-GE, Chambre administrative, judgment ATA/633/2009 of 1 December 2009, at 11; CJ-GE, Chambre administrative, judgment ATA/152/2009 of 24 March 2009, at 23.

The Court has also applied the VCLT's methods to the Swiss–US Social Security Agreement. In line with the Swiss Federal Tribunal's practice (*supra*, 3.3.1.1), it has noted that the VCLT introduced some changes in the methods used by the highest court to interpret such treaties, especially because it requires that treaty terms be in principle interpreted independently from domestic law.[1660] The Court has also stated that the interpretation of an exchange of letters between the Swiss government and the WHO is governed by the VCLT.[1661]

Overall, hardly any ruling of the Court uses the methods of the VCLT in a predictable, clear, and consistent way. The methods of the Convention are often referenced at the beginning of the interpretative process, but they are seldom applied in a rigorous fashion.

3.3.3.2 *The High Court and the Administrative Court of the Canton of Zurich*

The High Court and Administrative Court of the canton of Zurich do not frequently refer to the methods of the VCLT. Some decisions of the High Court follow the Swiss Federal Tribunal's case law on treaty interpretation and, thereby, the methods of the VCLT,[1662] though often implicitly.[1663] In several judgments dating from 2018 and pertaining to the Swiss–EU Agreement on the Free Movement of Persons, the High Court held that the treaty was not to be interpreted based on domestic law, but 'out of itself, in good faith, and in light of its object and purpose', yet the Court did not mention the VCLT.[1664] Only a handful of cases deal with the methods of treaty interpretation, and the courts' approach is not always in line with the broader Swiss and international practice and/or with the VCLT.

A High Court decision of 1997 highlights, in addition to restrictive interpretation, that treaty interpretation aims at identifying the intentions of the parties.[1665] These two positions are somewhat dated, and they are not commonly

1660 CJ-GE, Chambre des assurances sociales, judgment ATAS/507/2017 of 15 June 2017, at 9; CJ-GE, Chambre des assurances sociales, judgment ATAS/495/2016 of 23 June 2016, at 10 c).

1661 CJ-GE, Chambre des assurances sociales, judgment ATAS/813/2015 of 28 October 2015, at 5.

1662 'Obergericht, II. Zivilkammer, Beschluss vom 8. April 2002' (2002) 101 Blätter für Zürcherische Rechtsprechung 276, para 3.1.

1663 See however VwGer-ZH, judgment SB.2012.00088 of 18 December 2013, at 20.

1664 OGer-ZH, judgment SB170315 of 16 January 2018, at 2 b); OGer-ZH, judgment SB180164 of 5 October 2018, at 2 c); OGer-ZH, judgment SB180165 of 5 October 2018, at 2 c); OGer-ZH, judgment SB180235 of 5 October 2018, at 7.2. An indirect reference to the VCLT can be found in a later case in which the Court quotes the Swiss Federal Tribunal: OGer-ZH, judgment SB180098 of 26 February 2019, at 6.2.

1665 'Obergericht, I. Zivilkammer, Beschluss vom 11. April 1997' (1997) 96 Blätter für Zürcherische Rechtsprechung 261, para 2.

adopted in the Swiss case law. Some decisions stress the importance of 'autonomous interpretation'.[1666]

The Administrative Court has inquired into the intentions of the treaty parties as well.[1667] In a ruling of 2003 pertaining to the Swiss–EU Agreement on the Free Movement of Persons, it stressed the wording, object and purpose, and context of the agreement.[1668] Contrary to what art. 31 f VCLT allow, it also emphasized the 'Swiss perspective' on the agreement's object and purpose.[1669] In another decision of 2003, the Administrative Court highlighted the object and purpose of the Swiss–EU Agreement, noting that Switzerland had 'not been able to carry through its position' on some aspects and had '*de facto* been forced to adopt EU law'.[1670] These statements could suggest that the Court is influenced by partisan motives. By contrast, in a ruling of 2013, the Court mentioned the case law of the Swiss Federal Tribunal to state that DTAs must be interpreted based on the VCLT's methods.[1671] It is worth noting that it sometimes merely recites the provisions of a treaty without interpreting them.[1672]

3.3.3.3 *The Court of Appeals of the Canton of Basel-Stadt*

As a reminder, the Court of Appeals of the canton of Basel-Stadt is the highest judicial body of the canton in civil, criminal, administrative, and constitutional matters (*supra*, Chapter 3, 4.1.2.3). Deciding in its administrative court capacity, the Court of Appeals has relied on art. 31 f VCLT and on the case law of the Swiss Federal Tribunal to interpret an agreement between the BIS and the canton of Basel-Stadt.[1673] In a judgment of 2018 pertaining to the UN Convention on Contracts for the International Sale of Goods, the Court stressed that interpreters had to take the international character of the Convention into account. It mentioned the four interpretative methods of international law, as well as the comparative law method. The Court further emphasized the importance of aiming for 'practicable' interpretative outcomes.[1674] Overall, however,

1666 'Obergericht, II. Zivilkammer, Beschluss vom 30. September 2005' (2005) 106 Blätter für Zürcherische Rechtsprechung 33, para 1.

1667 Eg VwGer-ZH, judgment VB.2013.00274 of 4 September 2014, at 6.3.4.

1668 VwGer-ZH, judgment VB.2003.00175 of 22 October 2003, at 2–4.

1669 Ibid, at 4 h).

1670 VwGer-ZH, judgment VB.2002.00405 of 19 March 2003, at 3 d).

1671 VwGer-ZH, judgment SB.2012.00088 of 18 December 2013, at 20. See also VwGer-ZH, judgment SB.2016.00118 of 31 May 2017, at 2.2.1.

1672 Eg VwGer-ZH, judgment VB.2013.00274 of 4 September 2014.

1673 'Urteil des Verwaltungsgerichts vom 17.8.2001 in Sachen Ehegatten X.-Y'. (2003) Basler Juristische Mitteilungen 214, para 2 c).

1674 AG-BS, judgment ZB.2017.20 of 24 August 2018, at 3.2.

very few cases deal with treaties in the first place, let alone with their interpretative methods.

3.3.3.4 *The High Court and the Administrative Court of the Canton of Bern*

As a general matter, very little case law of the High Court and Administrative Court of the canton of Bern that is available online deals with the methods of treaty interpretation, although treaties are mentioned in some decisions. The High Court hardly ever refers to the VCLT's methods. The Administrative Court has noted that the Swiss–EU bilateral agreements must be interpreted 'autonomously', pursuant to the methods of the VCLT.[1675] However, only very few of its rulings refer to the VCLT and to its methods. In a detailed judgment pertaining to the Swiss–Thai DTA, and based on the practice of the Swiss Federal Tribunal and legal scholarship, the Administrative Court stated that DTAs must be interpreted pursuant to CIL and the VCLT. It especially referred to textual and systemic interpretation (with unusually copious references to other DTAs concluded by Switzerland),[1676] insisting on the fact that its interpretation was consistent with the Swiss Federal Tribunal's case law.[1677] In another, equally detailed judgment of 2018 pertaining to the Swiss–Thai DTA, the Court stated that unilateral declarations issued by one of the treaty partners were not part of the context of the treaty as per art. 31(2) VCLT, thereby rejecting the argumentation of the federal tax authorities.[1678] Such rulings are exceptional occurrences in the case law.

3.3.4 Military Tribunals

Many decisions of the MCC[1679] concern alleged failures of members of the military to comply with their duty to serve. As regards the MCC's interpretative

1675 'Urteil des Verwaltungsgerichts (Sozialversicherungsrechtliche Abteilung) vom 28. Dezember 2012 in Sachen B. gegen Gemeinsame Einrichtung KVG (VGE 200.2012.892)' (2013) Bernische Verwaltungsrechtsprechung 487, para 3; 'Auszug aus dem Urteil des Verwaltungsgerichts (Sozialversicherungsrechtliche Abteilung) vom 14. Januar 1999 in Sachen P.K. gegen Arbeitslosenkasse AdU (AlV 53180)' (1999) Bernische Verwaltungsrechtsprechung 373, para 5 a).

1676 VwGer-BE, judgment 100 2014 12 of 20 April 2016, at 5.1 ff.

1677 Ibid, at 5.5.

1678 VwGer-BE, judgment 100 2017 27 of 1 May 2018, at 5.2 (pertaining to VwGer-BE, judgment 100 2014 12 of 20 April 2016). See also VwGer-BE, judgment 100 2017 24 of 29 June 2018, at 4.3.1.

1679 As mentioned in Chapter 3, the present analysis includes the decisions of the Military Court of Cassation (MCC) accessible online since 2006, see <www.oa.admin.ch/de/entscheidungen-militaerjustiz.html>. Scope precluded a systematic analysis of the Court's comprehensive database (available at <eu.alma.exlibrisgroup.com/view/delivery/41BIG_INST/12329504630001791#main-carousel>). Decisions of the lower military

methods in general, the Court has endorsed the Swiss Federal Tribunal's 'pragmatic methodological pluralism'.[1680] Overall, the MCC mentions treaties very rarely.[1681] One of the few cases in which treaty law was applied is a decision of 2011 pertaining to the 2007 Swiss–Italian Convention on the military service of dual nationals.[1682] The Court only lists a number of provisions of the Convention. It does not provide insights into the methods of treaty interpretation. The same applies to another case of 2012 pertaining to the same treaty.[1683] While some decisions of the MCC mention the ECHR, they primarily use the case law of the Swiss Federal Tribunal to interpret the Convention.[1684] In a decision of 2013, the Court interpreted art. 5 ECHR based on scholarly writings.[1685]

A landmark case in which the Court applied international law is the *Niyonteze* judgment, decided in 2001.[1686] The case mainly pertained to common art. 3 of the Geneva Conventions and their Additional Protocol II (AP II). The Court also interpreted the former art. 109 of the Swiss Military Criminal Code (SMCC), which sanctioned violations of IHL treaties.[1687] Unfortunately, the case does not reveal the methods based on which these treaty provisions must be interpreted. To interpret common art. 3, the Court referred to the ICTY's case law[1688] and to the ICRC commentary on AP II.[1689] It also relied on the ICTR's practice to establish the existence of a non-international armed conflict pursuant to common art. 3.[1690] To clarify the notions of intentional homicide or murder under IHL, the Court mentioned a dispatch of the Federal

courts were not surveyed systematically, although I occasionally mention rulings deemed relevant. Given the absence of a search engine that can identify relevant decisions of the military courts, the survey of the MCC's recent decisions was complemented by scholarship and case reports by NGOs or other private or public bodies.

1680 MCC, judgment of 14 December 2012, DMC Vol 13 No 34, at 2 b); MCC, judgment of 19 September 2013, DMC Vol 13 No 39, at 3.2.1.

1681 For a case presenting an international dimension, but in which no treaty between Switzerland and Turkey had been concluded, see MCC, judgment of 10 December 2009, DMC Vol 13 No 17, at 2 a). See however ibid, at 2 d) (reference to treaties with other States than Turkey).

1682 MCC, judgment of 21 September 2011, DMC Vol 13 No 28.

1683 MCC, judgment of 14 December 2012, DMC Vol 13 No 35, at 3.2.

1684 MCC, judgment of 24 April 2007, DMC Vol 13 No 3, at 3, and MCC, judgment of 24 April 2007, DMC Vol 13 No 4, at 3; MCC, judgment of 20 June 2013, DMC Vol 13 No 38, at 3.2.

1685 MCC, judgment of 8 February 2013, DMC Vol 13 No 36, at 2 b) aa).

1686 MCC, judgment of 27 April 2001, DMC Vol 12 No 21 (the decision is available at <eu.alma.exlibrisgroup.com/view/delivery/41BIG_INST/12329504630001791>).

1687 See also art. 110 ff SMCC (as of 1 January 2019).

1688 MCC, judgment of 27 April 2001, DMC Vol 12 No 21, at 3 c).

1689 Ibid, at 9 a).

1690 Ibid, at 3 d).

Council.[1691] It noted that as the highest military court, it had to interpret art. 109 SMCC autonomously.[1692] Whether it was alluding to its hierarchical position in the Swiss military judiciary or to its autonomy from international courts is unclear.[1693]

3.4 *Relationship with Interpretative Methods under Swiss Law*

How do the methods used by Swiss courts to interpret treaties relate to those they employ to interpret Swiss law? Given the richness and influential character of the Swiss Federal Tribunal's case law regarding domestic interpretative methods, the Court constitutes my focus in this subsection.

In the context of domestic statutory[1694] and constitutional[1695] interpretation, but also with regard to other domestic legal acts[1696] (and even before their formal adoption),[1697] the Swiss Federal Tribunal uses the same four interpretative methods as those governing the interpretation of international law (*supra*, Chapter 6, section 2). This is true even though the way in which these methods are used can vary, *inter alia* depending on the legal source at stake.[1698] It is important to acknowledge that in domestic interpretation as well, the legality and quality of the Court's reasoning are sometimes problematic.[1699]

The Swiss Federal Tribunal has explicitly acknowledged that the basic methods of treaty interpretation and the methods of domestic statutory interpretation[1700] (and, more generally, the interpretative methods of 'general and abstract rules of domestic law')[1701] are the same. Given the monism of the

1691 Ibid, at 9 a).

1692 Ibid, at 9 d).

1693 The remarks of the MCC suggest that it is probably the former, as the Court then stated that there was no reason not to adopt the criteria used by the ICTR to determine whether common art. 3 and AP II had been violated. See ibid, at 9 d).

1694 BGE 141 III 155, at 4.2; BGE 140 IV 28, at 4.3.1; BGE 123 II 595, at 4 a).

1695 BGE 83 I 173, at 4 (interpretation of a cantonal constitution); BGE 118 Ib 187, at 4, and BGE 116 Ia 359, at 5 c) (interpretation of the Cst.).

1696 Eg BGE 137 I 31, at 2, and BGE 140 I 2, at 4 (interpretation of an intercantonal agreement); BGE 102 II 401, at 3, and BGE 137 III 337, at 3 (interpretation of a federal ordinance); BGE 140 III 349, at 2.3 (interpretation of the bylaws of large corporations).

1697 BGE 124 I 107, at 5 b) (interpretation of a cantonal popular initiative).

1698 In the context of constitutional interpretation, for instance, the Court is more cautious to use evolutive (teleological) interpretation. See BGE 115 Ia 127, at 3 a) (where the Court also distinguishes between so-called organic provisions and provisions protecting fundamental rights).

1699 For a critique, see Pichonnaz and Vogenauer (n 105). See also Chapter 3, 4.2.6 (*supra*).

1700 Eg BGE 136 I 290, at 2.3.2.

1701 BGE 130 I 312, at 4.1; BGE 136 I 290, at 2.3.2. See also BGE 135 V 339, at 5.3. The Court has distinguished between the methods of statutory interpretation and the methods

Swiss legal order (Chapter 3, 2.2.1, *supra*), this conception is also reflected in the Court's statement that the four methods (textual, systematic, teleological, and historical, see also Chapter 6, *supra*) apply in the domestic legal order at large.[1702] Though some cases could suggest a difference (or only a 'relative similarity')[1703] between the methods of treaty interpretation and those of domestic law,[1704] there is no indication in the case law that these methods are actually different. Rather, the disjunction to which the Court alludes concerns the idiosyncratic features of domestic and international lawmaking, respectively.

As a matter of fact, many features of the Court's case law on domestic methods confirm this convergence. In the domestic context, the Swiss Federal Tribunal considers that the various methods do not stand in any hierarchical relationship.[1705] However, a provision cannot be interpreted *contra legem*,[1706] unless weighty reasons justify it.[1707] The Court has noted that it relies on the text alone in exceptional cases, when its meaning leaves no room for doubt.[1708] It also relies on systematic[1709] and teleological[1710] arguments. It has highlighted the importance of subsequent interpretative practice to identify the meaning of written legal acts.[1711] This feature is reminiscent of the subsequent practice that is relevant in the context of treaty interpretation, as per art. 31(3)(b) VCLT. The Swiss Federal Tribunal acknowledges that historical interpretation is not decisive, but an 'interpretative aid'.[1712] This position is consistent with the status of 'auxiliary means' of the *travaux* pursuant to art. 32 VCLT.

The case law confirms that interpretative methods are the same in domestic law and treaty law, even if some differences exist between domestic and international lawmaking (eg the characteristics of lawmaking bodies in domestic and international law, respectively). The fact that the Swiss Federal Tribunal, at

applicable to contractual interpretation, although it applies the methods of statutory interpretation to the bylaws of large corporations, see BGE 140 III 349, at 2.3.

1702 BGE 83 IV 121, at 2.

1703 BGE 136 I 290, at 2.3.2; BGE 135 V 339, at 5.3; BGE 130 I 312, at 4.1.

1704 BGE 110 Ia 123, at 1.

1705 BGE 141 III 155, at 4.2; BGE 139 III 225, at 2.2; BGE 131 V 305, at 4.4; BGE 123 II 595, at 4 a); BGE 98 Ia 194, at 2 a); BGE 83 I 173, at 4; BGE 131 II 697, at 4.1.

1706 BGE 98 Ia 194, at 2 a). See also BGE 83 I 173, at 4.

1707 BGE 118 Ib 187, at 5 a); BGE 141 II 262, at 4.2; BGE 113 V 150, at 3 a).

1708 BGE 131 II 697, at 4.1.

1709 BGE 129 III 656, at 4.2.2.

1710 On teleological interpretation, see BGE 128 I 34, at 3 b). See also BGE 123 III 442, at 2 d); BGE 129 III 656, at 4.3.

1711 BGE 83 I 173, at 4. See also BGE 116 Ia 359, at 5 c).

1712 BGE 141 III 155, at 4.2; BGE 123 II 595, at 4 a). See also BGE 83 I 173, at 4, and BGE 83 IV 121, at 2, where the Court analyzes historical interpretation in detail.

times, compares the methods of treaty interpretation with domestic law, suggests that the Court draws on (and is influenced by) methodological insights gained in the context of domestic interpretation when it interprets treaties. *Vice versa*, the Court has used the methods of treaty interpretation to interpret some domestic laws, especially intercantonal agreements (eg *supra*, 3.1).

3.5 *Comparing the Practice of Swiss Courts*

The preceding survey of Swiss courts' practice of treaty interpretation (*supra*, 3.1–3.3) opens the doors for a comparison of their respective approaches.

The Swiss Federal Tribunal's case law is cited and followed by all Swiss courts under scrutiny. While this practice is not necessarily the oldest, given the long-standing activity of cantonal courts, it is by far the most easily accessible, and it covers the longest period of time. These practical considerations aside, relevant judgments of other courts are much scarcer, except for the SFAC's. The Swiss Federal Tribunal's appellate function in the Swiss judiciary largely explains the Court's interpretive authority. This authority also hinges on other factors, including the breadth of the Court's jurisdiction (contrary to the narrow jurisdiction of the SFCC, for instance), the range of treaties the Court has interpreted, and the detailed guidance it provides on interpretative methods regarding specific treaties (eg the Swiss–EU Agreement on the Free Movement of Persons), but also more generally (by endorsing the VCLT's methods). Other courts tend to provide more precise interpretations in politically sensitive cases only, eg the SFCC in *Nezzar*, or the SFAC in cases pertaining to DTAs and the UBS Agreement.

Only the SFAC's practice is as detailed as (and, occasionally, more detailed than) the Swiss Federal Tribunal's. This is especially the case when the SFAC interprets DTAs and the UBS Agreement. The Court has been more thorough than the Swiss Federal Tribunal when assessing the customary character of the VCLT's methods, and when determining whether the VCLT has codified or crystallized custom, for instance. It is also more explicit in its endorsement of 'pragmatic methodological pluralism' in the context of international law. On the other hand, its case law is more specialized than the Swiss Federal Tribunal's and, at times, more ambiguous and contradictory. This is for example the case when the SFAC uses the practice of the Swiss authorities to interpret a treaty, but does not accept such unilateral interpretations when they are based on the practice of Switzerland's treaty partners.

While the sophistication and precision of the Swiss Federal Tribunal's case law has increased over time, its recent practice also comes with flaws from the perspective of interpretative methods and good judicial reasoning. Recurring problems include repetitive tendencies, a lack of genuine engagement with

the legal act and its characteristics in some cases (eg when the Court simply relies on art. 31(1) VCLT, or when it primarily uses scholarship to underpin its interpretative conclusions), circularity (ie, references to the Court's own interpretations), and self-referentiality (ie, references to the practice of other Swiss courts and authorities). Moreover, in some instances, its practice is squarely at odds with the VCLT. One common mistake pertains to the use of domestic legislative history (especially the dispatch of the Federal Council) to interpret treaties.

These problematic features can be found in the practice of all courts under scrutiny, to the extent that their case law is detailed enough. Most courts have endorsed the customary character of the VCLT's methods, and many have noted the congruence that exists between the interpretative methods of domestic written law and those of treaties. Courts also acknowledge the duty of States to interpret treaties in good faith and independently from domestic law. However, some courts, like the SFCC, hardly ever refer to the VCLT. Swiss courts barely depart from the path traced by the Swiss Federal Tribunal. They often strive to demonstrate that their case law is consistent with it. Exceptionally, cantonal jurisdictions have adopted unorthodox approaches, eg by engaging in contractual interpretation or by mentioning restrictive interpretation.

Swiss courts' interpretative methods are particularly detailed with regard to DTAs, the Swiss–EU Agreement on the Free Movement of Persons, and social security agreements. The courts tend to adopt idiosyncratic interpretative approaches in different substantive areas of international law. With regard to the Swiss–EU Agreement on Free Movement, for instance, the Swiss Federal Tribunal (followed by other Swiss courts) tends to emphasize purposive interpretation.[1713] Its approach is less markedly teleological for other treaties. Independently from the characteristics of different regimes and from the fact that not every case raises complex interpretative issues, courts do not seem to use a predictable, clear, and consistent interpretative scheme across cases.

The Swiss Federal Tribunal occasionally uses the practice of other Swiss authorities, especially that of the Swiss Federal Council. Other Swiss courts tend to follow the Swiss Federal Tribunal, and they typically neglect the practice of other State organs, including the executive. All Swiss courts make scarce use of foreign and international case law. One exception is the case law of the ECtHR, which is often (and sometimes extensively) cited by the Swiss Federal Tribunal in relevant cases.[1714] Most courts use scholarship which, sometimes,

1713 On this issue, see already Besson and Ammann (n 97) 340 ff.

1714 For a detailed analysis, see Ammann, 'The European Court of Human Rights and Swiss Politics: How Does the Swiss Judge Fit In?' (n 1369).

is even their only resource. This casts doubt on whether they have thoroughly engaged with the practice on a given issue, especially when few authors are cited.

Many other empirical causes likely explain some of the variations in the case law (eg the composition of a court in different cases). Their in-depth examination is beyond the scope of this study.

3.6 *Putting the Swiss Judicial Practice into Perspective*

The survey of the Swiss judicial practice also makes it possible to compare[1715] this practice with that of other domestic courts.

The Swiss case law resembles that of other domestic courts in many respects. Shared features include the endorsement of the VCLT's methods *qua* customary law, but also a tendency to refer to these methods selectively, or without necessarily following through. Courts also tend to not always explicitly acknowledge the mandatory character of these methods. They rely on their own precedents, and they provide little detail as to their interpretative methodology. Their degree of diligence seems to hinge on the subject matter of the case. Finally, domestic courts sometimes disregard the constraints established by interpretative methods, eg by referring to domestic (but not to intergovernmental) preparatory work that pertains to the ratification of a specific treaty.

In other regards, the Swiss judicial practice differs from that of foreign courts. Swiss judges seem to consider interpretative methods to be obligatory, unlike other judges, especially judges in jurisdictions that are not parties to the VCLT. Another difference is that the Swiss Federal Tribunal is keener to use these methods than other Swiss (and especially cantonal) courts, unlike in the United States for instance, where the Supreme Court is reluctant to use these methods, contrary to the lower courts. Swiss courts are also less inclined to cite foreign materials (eg foreign judgments). This is likely partly due to the laconic style of Swiss rulings, and to the absence of separate opinions in the Swiss judiciary (see *supra*, Chapter 3, 4.2.5).

1715 Of course, as previously mentioned (*supra*, 2.1), comparability is limited by the layer of domestic constitutional law that inevitably conditions domestic courts' interpretations, by the scarcity of material available for some foreign jurisdictions, and by the fact that the scope of this project precluded analyzing these practices with the same level of detail as the Swiss case law.

4 Evaluation

While Swiss courts sometimes diligently follow the methods of treaty interpretation, some features of their practice are problematic from the perspective of legality and high-quality reasoning (*supra*, Introduction, section 3). I identify four clusters of problems.

1. *Neglect of interpretative methods*. Courts tend to ignore the methods of treaty interpretation. This omission is either systematic, frequent, or occasional (eg only in connection with specific treaties). It ranges from full neglect to the neglect of only some methods (which usually goes along with biases in favor of other methods) and the conditions under which they apply (eg art. 32 VCLT). Cantonal courts hardly refer to treaty interpretation and its methods. Another symptom of this neglect is that the courts have used concepts that are not required by the interpretative methods of international law, eg *effet utile* and restrictive interpretation, and domestic concepts and categories. Finally, courts are sometimes hesitant to embrace the customary character of some methods, and they mention Switzerland's ratification of the VCLT to justify their applicability.
   To ignor interpretative methods is particularly problematic from the perspective of legality. The less courts dwell upon their interpretative approach, the more difficult it is to evaluate whether their decisions have been reached in conformity with the law. Of course, not every case raises difficult interpretative issues, and it would be counter-productive to require courts to elaborate on their interpretative methodology in such instances. However, in many rulings, controversial interpretative issues do arise, which calls for a more careful approach to interpretative methods.
   The neglect of interpretative methods also creates difficulties from the vantage point of the quality of judicial reasoning. Indeed, in doing so, courts fail to reason predictably, clearly, and consistently.
2. *Selective reliance on auxiliary means and insufficient substantiation*. Courts often assert a given interpretation without substantiating this conclusion. Assertion is not necessarily problematic. It may be appropriate when a relatively straightforward legal issue is involved. However, assertion is deeply problematic when it is used to conceal a lack of methodological rigor. Such rigor is required from the perspective of both the legality and the quality of judicial reasoning.[1716]

1716 This type of assertion has been denounced by Stefan Talmon with regard to the ICJ's identification of customary international law; see Talmon (n 73). See also Ryngaert and Hora Siccama (n 229).

A related feature of the case law is that courts tend to rely on auxiliary means, instead of direct manifestations of State practice on treaty interpretation. Again, using auxiliary means is not necessarily flawed, and it is in line with art. 38(1)(d) ICJ Statute. Yet the selective and sloppy resort to such means can lead courts to ignore the actual State practice, which (in CIL at least) must be coherent, constant, and general. It is hence potentially problematic from the perspective of legality. As a matter of fact, courts particularly often use legal scholarship, while neglecting the practice of their treaty partners, and international judicial decisions. Moreover, high-quality judicial reasoning requires that interpretations be backed by predictable, clear, and consistent reasoning.

3. *Self-referentiality and circularity*. The Swiss judicial practice is highly self-referential (when courts cite other Swiss authorities) and even circular (when they cite themselves). Courts frequently rely on the interpretative practice of the Swiss authorities, especially the practice of Swiss courts. They particularly frequently rely on their own previous case law. This is, again, problematic from the perspective of the legality and quality of judicial reasoning. Indeed, it can lead to a disregard for the sources of international law and for the characteristics of international lawmaking (which, by definition, involves more than one Sate). It can also undermine the predictability, clarity, and consistency of judicial reasoning, since it may conceal a lack of transparency and of thorough engagement with the interpretative issue.
4. *Imprecision, uneven level of detail, and superficial reasoning*. Courts rarely apply the interpretative methods of treaty law in a systematic, detailed, and transparent way. The level of detail of their case law is uneven. Some remarks about the methods of treaty interpretation, though pedagogical and detailed, are highly repetitive. This suggests that courts do not actually engage with these methods, but merely pay lipservice to them. Again, it is important to stress that not every interpretative issue is complex and controversial. This explains the heterogeneity of the case law to a certain extent. Moreover, repetitive cases may be due to the fact that the basic interpretative issue at stake is essentially identical. On the other hand, superficial reasoning can create the sense that an issue is clear, even though it does raise interpretative issues. It also risks disregarding the sources and specificities of international law and of the issue at hand. Finally, it prevents predictable, clear, and consistent reasoning.

To conclude, in at least four respects, the Swiss judicial practice of treaty interpretation stands in tension with the methods of treaty interpretation and with high-quality reasoning. As I will show, these clusters of problems also arise, *mutatis mutandis*, in connection with unwritten international law (Chapter 8, section 4, *infra*).

CHAPTER 8

Swiss Courts and the Interpretation of Unwritten International Law

> [There is a] need for clarity as regards the sources of public international law, or at least as much clarity as possible. Questions relating to sources lie at the heart of international law. Of particular concern is the lack of rigour shown by some domestic judges when it comes to determining the rules of customary international law.[1717]

> [How the existence of rules of customary international law, and their content, are to be determined,] is not only of concern to specialists in public international law; others, including those involved with national courts, are increasingly called upon to identify rules of customary international law. In each case, a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly.[1718]

1 Introduction

While treaty law is undoubtedly the source of international law that is most frequently used in domestic courts, it is not the only one. Besides written international legal acts, courts also apply unwritten ones, namely customary international law (CIL) and general principles of international law.[1719]

1717 Michael Wood, 'What Is Public International Law? The Need for Clarity About Sources' (2011) 1 Asian Journal of International Law 205, 205.

1718 ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891) 122 para 2.

1719 There is a wealth of literature on unwritten international law. For recent contributions, see eg Peter Staubach, *The Rule of Unwritten International Law: Customary Law, General Principles, and World Order* (Routledge 2018); Chimni (n 1193).

Compared to treaty law (*supra*, Chapter 7), there is little domestic judicial practice pertaining to CIL, and this practice is often more 'hesitan[t]'.[1720] This *a fortiori* applies to general principles of international law, which are barely cited. As I will explain, courts' fluctuating terminology[1721] makes it hard to identify the few cases dealing with these two sources of international law.

Nonetheless, there are various important reasons for studying domestic courts' interpretation of CIL and general principles of international law. First, both do provide answers to international legal issues. Consider, for example, the customary principle *pacta sunt servanda*, or the general principle of international law according to which the violation of an international legal duty triggers a duty to provide reparation.[1722] The legal norms that prescribe the use of the four interpretative methods, as well as other secondary norms of international law, are customary norms themselves. Second, the interpretation of both CIL and general principles of international law is governed by specific methods with which States must comply (*supra*, Chapters 5 and 6). It is therefore important that this practice does not escape scrutiny. Third, the influence of CIL and general principles of international law on the formation of international law (especially on the formation of treaty law) cannot be overstated. A vast number of treaties have been codified based in part on CIL. Fourth, given that some States are frequently exposed to specific customary international legal issues and general principles of international law, their experience is at least occasionally relied on by other States to ascertain the law governing these matters (on the concept of 'specially affected States', see *supra*, Chapter 3, 2.1).

In the first section of this chapter, I examine the domestic judicial practice of CIL, with an emphasis on the Swiss practice (2). As always, my focus lies on courts' compliance with the interpretative methods of CIL, and with the virtues of high-quality reasoning (on these two basic criteria of evaluation, see *supra*, Introduction, section 3). The next section is devoted to domestic courts' interpretation of general principles of international law (3). I evaluate this practice based on the same aforementioned criteria. Finally, after this *tour d'horizon* of the Swiss practice, I provide an overall evaluation thereof (4), once again from the perspective of legality and quality. As was the case in my chapter on treaty law (Chapter 7, *supra*), the case law on which this chapter is based reflects the state of courts' online databases or websites in June 2019.

1720 Hegde (n 46).

1721 On this issue, see also Besson and Ammann (n 60) 16 ff.

1722 PCIJ, case concerning the *Factory at Chorzów* (*Germany v. Poland*), judgment, claim for indemnity, merits, PCIJ Series A No 17, 13 September 1928, 4, at 29.

It is important to recall at the outset that legal norms requiring the use of interpretative methods are secondary norms. Hence, they are customary norms. Norms about interpretative methods are largely the product of judicial law (*supra*, Chapter 5, section 3, and Chapter 6, section 2). When courts interpret custom, they generate a practice that can contribute to defining the interpretative methods of customary law (as is also the case with the methods of interpretation of treaty law and of general principles of international law). Indeed, domestic rulings provide evidence of the constitutive elements of CIL (*supra*, Chapter 4, 3.1.2). This explains, though it does not justify, why domestic courts may be tempted to refer to their own practice to identify customary interpretative methods. This circularity cannot detract from the fact that courts are not the only actors whose practice matters for the purposes of identifying customary interpretative methods. When interpreting international law, courts must use the methodological yardsticks defined by the practice of States at large, not only by themselves (or by their own State). This is the case regardless of whether domestic law requires them to respect their previous rulings, the case law of other domestic courts, or the decisions of other domestic authorities.

2 Customary International Law

In this section, I describe the practice of domestic courts on CIL in general (2.1), before taking a closer look at the Swiss judicial practice (2.2).

2.1 *Domestic Courts and the Interpretation of Customary International Law*

As was the case with treaty interpretation (*supra*, Chapter 7, section 2), the present section mainly relies on scholarly analyses of domestic courts' interpretation of CIL. I have relied on accounts providing insights (even at the margins) into the judicial interpretative methods of CIL in African,[1723] Asian,[1724] European,[1725]

1723 Maripe (n 354); Nwapi (n 1388).

1724 Takashiba (n 1383); Hegde (n 46); Marochkin and Popov (n 183); Karim (n 1383).

1725 Fleuren (n 1388); Patrick Capps, 'The Court as Gatekeeper: Customary International Law in English Courts' (2007) 70 Modern Law Review 458; Peter Bachmayer and August Reinisch, 'The Role of Judges at Austrian Courts in the Development of International Law' (2015) 14 The Law and Practice of International Courts and Tribunals 151; Wouters (n 1223); Stirling-Zanda (n 102); JHM Willems, 'Treatment of Customary International Law and Use of Expert Evidence by the Dutch Court in the Bouterse Case' (2004) 4 Non-State Actors and International Law 65; Paulus (n 1388); Handl-Petz (n 1384).

North American,[1726] South American,[1727] and Oceanian[1728] jurisdictions, as well as on broader analyses of the domestic practice.[1729] While I have, whenever possible, used analyses of domestic courts' interpretation of CIL that are not limited to a given substantive area (eg to IHRL), the dearth of scholarship on the issue made it necessary to also rely on more specialized contributions.[1730] Unfortunately, and even more so than for treaty law, it is difficult to find relevant scholarship for some jurisdictions, partly due to linguistic barriers and to limited online availability. It is crucial to develop this scholarship further in order to mitigate geographic bias.

Drawing parallels between foreign legal scholarship about the foreign court practice, on the one hand (2.1), and Swiss case law and legal scholarship, on the other (2.2), raises issues of comparability. Moreover, scholarship alone provides limited insight into a State's judicial practice, especially when this scholarship is scarce (which, unfortunately, is often the case). I hence also relied on judgments that had been added to the ILDC database as of June 2019.[1731] For similar reasons as for my analysis of treaty interpretation (*supra*, Chapter 7), I did not canvass all available ILDC judgments dealing with CIL and its methods. Instead, I focused on rulings from jurisdictions for which relevant scholarship was available.[1732]

Listing cases from an array of jurisdictions also raises questions of comparability given the differences that characterize domestic legal orders. In France,[1733] Mexico,[1734] and the Netherlands,[1735] for instance, the Constitution

1726 Paul L Hoffman, 'The "Blank Stare Phenomenon": Proving Customary International Law in U.S. Courts' (1996) 25 Georgia Journal of International and Comparative Law 181; Szewczyk (n 1133); Criddle (n 1141).

1727 José Luis Guzmán Dalbora, 'The Treatment of International Crimes in Chilean Jurisprudence: A Janus Face' (2010) 10 International Criminal Law Review 535; Dondé Matute (n 920); Pablo F Parenti, 'The Prosecution of International Crimes in Argentina' (2010) 10 International Criminal Law Review 491.

1728 Alan Boyle, 'International Law Before National Courts: Some Problems From a Common Law Perspective' (2004) 4 Non-State Actors and International Law 59; de Jonge (n 1387).

1729 Eg Staubach (n 1265); Iovane (n 182).

1730 This applies, for instance, to articles published in 2010 in a special issue of the International Criminal Law Review devoted to Latin America and ICL. See also Gordon A Christenson, 'Customary International Human Rights Law in Domestic Court Decisions' (1996) 25 Georgia Journal of International and Comparative Law 225; Akande and Shah (n 859).

1731 As is the case with treaty law, the database provides a filter for CIL.

1732 For these jurisdictions, I looked at all available judgments. One exception is the United States: in light of the large number of rulings available (138 as of June 2019), I focused on Supreme Court rulings.

1733 See Bernard Stirn's observations in 'The Judge and International Custom / Le juge et la coutume internationale' (Council of Europe 2013) 100.

1734 Dondé Matute (n 920) 579.

1735 Stirling-Zanda (n 102) 4.

does not specifically mention CIL. This contrasts with jurisdictions such as Australia, Germany, Greece, Italy, the Philippines, Portugal, Russia, and South Korea, which mention CIL or related umbrella terms and often regulate some aspects of its relationship with domestic law.[1736] While I do not analyze these constitutional characteristics, caution is warranted when comparing these various domestic practices. Even within one jurisdiction, a ruling cannot be appraised without the necessary caveats, eg the specific context in which CIL is interpreted.[1737]

When looking at these domestic practices, a first finding is that a reference to CIL in domestic constitutions does not guarantee that courts actually apply it. Jan Wouters, in a comparative analysis of domestic rulings in continental Europe, observes a gap between the law in the books (eg constitutional provisions providing that CIL is binding on the domestic legal order) and the law in practice.[1738] Admittedly, some courts, like the Dutch courts, have been applying CIL '[f]rom times immemorial',[1739] and in some substantive areas of international law, CIL is regularly applied, eg in the context of the law of immunities.[1740] In general, however, scholars (and practitioners)[1741] note that there is little domestic case law pertaining to this source of international law.[1742] This partly explains the limited availability of scholarship on the issue.

A common scholarly diagnosis concerns domestic judges' discomfort and hesitation vis-à-vis CIL.[1743] In the United States, civil rights lawyer Paul Hoffman humorously reports that invoking CIL in court triggers the so-called 'blank stare phenomenon', judging from the reaction of the bench.[1744] Other

1736 Eg the States listed by Yuji Iwasawa, 'Domestic Application of International Law' (2016) 378 Recueil des cours de l'Académie de droit international 24. For an overview of constitutional provisions of continental European States, see also Wouters (n 1223) 26 f.

1737 Stirling-Zanda (n 102) 5.

1738 Wouters (n 1223) 27.

1739 Fleuren (n 1388) 246.

1740 Akande and Shah (n 859).

1741 See Bernard Stirn's remarks in 'The Judge and International Custom / Le juge et la coutume internationale' (n 1733) 99.

1742 Eg in Nigeria: Nwapi (n 1388) 55; Christian N Okeke, 'The Use of International Law in the Domestic Courts of Ghana and Nigeria' (2015) 32 Arizona Journal of International and Comparative Law 371, 415. See also, on the Austrian case law, Reinisch and Bachmayer (n 1074) 10.

1743 Wouters (n 1223) 27. This unease is also reflected in legal scholarship, see Vassilis P Tzevelekos, 'Introductory Note: Beyond the Identification of International Customary Rules' (2017) 19 International Community Law Review 1, 1.

1744 Hoffman (n 1726). In Scotland, by contrast, courts have held that there is no need to produce expert evidence on the content of CIL, as it is part of Scots law. See Stephen C Neff,

US scholars denounce courts' 'legal procrastination'[1745] regarding CIL. Rosalyn Higgins observes that 'there is sometimes a nervousness or disinclination [of domestic courts] about getting into this area'.[1746] In Bangladesh, courts prefer to apply domestic legislation rather than CIL when mentioning a particular right.[1747] In Kenya as well, some cases show courts' failure to address relevant issues pertaining to CIL.[1748] Even when courts use a CIL norm, they are often eager to demonstrate that it has been codified, and/or that it is reflected in written statements.[1749] Courts are especially reluctant to apply CIL due to their concern that this might contradict the principle of legality, be it in the area of criminal law[1750] or more generally.[1751] In Latin America, by contrast, courts' use of CIL[1752] to set aside domestic statutory limitations has been considered unconstitutional by many scholars,[1753] and courts' methods for identifying CIL in this context have been criticized.[1754] For judges to neglect CIL as a matter of principle is deeply worrying, as it means a source of international law is being ignored by the courts. This is problematic from the perspective of the legality of judicial decisions, but also from the perspective of their quality, given that courts do not provide cogent reasons for this neglect.

'International Law and Nuclear Weapons in Scottish Courts' (2002) 51 International and Comparative Law Quarterly 171, 173 f.

1745 Hartka (n 183).

1746 Higgins (n 365) 211.

1747 Karim (n 1383) 106.

1748 *Kenya Section of the International Commission of Jurists v. Attorney General and Minister of State for Provincial Administration and Internal Security and Kenyans for Justice and Development Trust* (*Joining*), Final judgment, [2011] eKLR, ILDC 1804 (KE 2011), 28 November 2011, Kenya; Nairobi; High Court.

1749 For a critical analysis, see Wouters (n 1223) 28 ff.

1750 de Jonge (n 1387) 45; Pablo Galain Palermo, 'The Prosecution of International Crimes in Uruguay' (2010) 10 International Criminal Law Review 601, 611 f; Stirling-Zanda (n 102) 6. See however Guzmán Dalbora (n 1727) 544; Dino Carlos Caro Coria, 'Prosecuting International Crimes in Peru' (2010) 10 International Criminal Law Review 583, 596.

1751 On these concerns, see Handl-Petz (n 1384) 86 f.

1752 On the use of international law more generally for this purpose, see Viera Gallo Quesney and Lübbert Álvarez (n 1386) 109 ff. See however (regarding amnesty laws) Eguiguren Praeli (n 1386) 4.

1753 Eg (in Argentina), Parenti (n 1727) 498 ff. For examples of such cases, see (among others): *Office of the Prosecutor v. Priebke* (*Erich*), Ordinary appeal judgment, request of extradition, P/457/XXXI, ILDC 1599 (AR 1995), 2 November 1995, Argentina; Supreme Court [CSJ]; *Riveros v. Office of the Public Prosecutor*, Recourse of cassation and unconstitutionality, M 2333 XLII, ILDC 1084 (AR 2007), 13 July 2007, Argentina; Supreme Court [CSJ].

1754 Eg *Chile v. Arancibia Clavel* (*Enrique Lautaro*), Appeal Judgment, Case No 259, A 533 XXXVIII, ILDC 1082 (AR 2004), 24 August 2004, Argentina; Supreme Court [CSJ], and the attached analysis of ILDC reporter Fabián Raimondo.

Judges' unease regarding CIL is particularly problematic given some of the (usually implicit) considerations on which it rests. Jan Wouters, whose analysis focuses on continental Europe, mentions the widespread assumption that CIL is indeterminate, and judges' concern that its application might be perceived as 'undemocratic'. However, as Wouters rightly notes, these characteristics and risks are by no means necessary and unique features of CIL. According to him, courts are mostly inhibited by 'psychological factors'.[1755] Other explanations for this judicial uneasiness towards CIL listed by Wouters are constraints imposed by domestic constitutional law, including domestic procedural rules (all of which are irrelevant from the perspective of the State's duty to comply with international law), the (flawed) understanding that custom primarily governs interstate relations and hence lacks direct effect, and both lawyers' and judges' lack of familiarity with CIL.[1756] This last point is symptomatic of a more generalized, yet mistaken, neglect of unwritten law, be it domestic[1757] or international.[1758] August Reinisch and Peter Bachmayer contend that domestic courts' frequently careless and laconic treatment of CIL is primarily due to 'pragmatic' efficiency considerations.[1759] Several scholars have noted that the application of CIL is at least partly contingent on the composition of the bench.[1760]

What also emerges from the domestic judicial practice is the imprecise terminology used by domestic courts to refer to CIL. This jeopardizes predictability, clarity, and consistency, but also legality when the two-tiered test of State practice and *opinio juris* is elided. CIL is sometimes ambiguously or implicitly referred to (eg via the expression 'rules of international law').[1761] Courts often fail to distinguish CIL from general principles of international law,[1762] and they tend to conflate CIL and *jus cogens*.[1763] August Reinisch and Peter Bachmayer

1755 Wouters (n 1223) 31 ff.

1756 See ibid.

1757 Staubach (n 1265) 115.

1758 Eg *Paquete Habana*, Decision, No 395, No 396, 175 US 677 (1900), 20 S.Ct. 290 (1900), 44 L.Ed. 320 (1900), ILDC 392 (US 1900), 8 January 1900, United States; Supreme Court [US], at para 68.

1759 Reinisch and Bachmayer (n 1074) 47.

1760 Eg in Bangladesh: Karim (n 1383) 106 ff. Another example is Chile: Guzmán Dalbora (n 1727) 537.

1761 Eg (mentioning the practice of English courts) Maripe (n 354) 259.

1762 Handl-Petz (n 1384) 88; Marochkin and Popov (n 183) 230 f; Wouters (n 1223) 34. This confusion is sometimes already enshrined in domestic constitutional law. See Hannes Vallikivi, 'Domestic Applicability of Customary International Law in Estonia' (2002) VII Juridica international 28, 31.

1763 Marochkin and Popov (n 183) 230 f.

note that Austrian courts sometimes refer to 'general international law', which thus circumvents the two-tiered test required for the determination of CIL.[1764] Similarly, as observed by Massimo Iovane, courts sometimes rely on general principles of international law instead of establishing the existence of State practice and *opinio juris* (a stringent test which may thwart the proof of the existence of CIL).[1765] In Botswana, the High Court has relied on soft law to establish an 'international consensus on the importance of access to water', without mentioning CIL, and without clarifying how it had ascertained this consensus.[1766]

Even when courts apply and clearly refer to CIL, their reasoning is rarely detailed, which is problematic from the perspective of the legality and quality of judicial reasoning. Courts typically neglect the two constitutive elements of State practice and *opinio juris*. When they mention CIL, they simply assert its existence without substantiating their statements.[1767] Iovane notes that domestic courts tend to assert the customary nature of specific treaties (or, more generally, of a given norm) without examining State practice on the issue.[1768] Simonetta Stirling-Zanda, in her study of the practice of a number of European courts, notes that judges seldom look at State practice and *opinio juris*.[1769] She observes that in the Italian case law, for instance, a thorough analysis of the two constitutive elements of custom is 'a rare finding'.[1770] In Estonia, Hannes Vallikivi criticizes the laconism of the domestic judicial practice on CIL, noting that courts do not explain why custom is (or is not) applied in the case at hand.[1771]

Scholars also note the uneven level of detail of the case law on CIL within the same jurisdiction.[1772] As already mentioned, not every case in which CIL is applicable requires a thorough, exhaustive analysis of custom and of its interpretative methods, and considerations of judicial economy preclude

1764 Reinisch and Bachmayer (n 1074) 41 ff.
1765 Iovane (n 182) 617.
1766 Maripe (n 354) 277.
1767 Hegde (n 46) 69; Stirling-Zanda (n 102) 17; Reinisch and Bachmayer (n 1074) 31. On the ICJ's tendency to assert the existence of CIL, see Talmon (n 73).
1768 Iovane (n 182) 610 f.
1769 Stirling-Zanda (n 102) 3 f.
1770 See ibid 13. See eg *Chibomba v. Embassy of the Republic of Zambia to the Italian Republic*, Final appeal judgment, Case No 13980/2017, ILDC 2703 (IT 2017), 6 June 2017, Italy; Supreme Court of Cassation. In this ruling, the Court wrongly stated that art. 11 UNCSI had customary status.
1771 Vallikivi (n 1762) 37.
1772 Stirling-Zanda (n 102) 17.

judges from doing so. The level of detail that is appropriate mainly hinges on the difficulty of the interpretative issue. Yet a generalized neglect of methodological issues is worrying. It leaves the door open for unlawful and poor-quality decision-making.

There are, of course, exceptions to these trends. Some courts have provided elaborate accounts of the conditions under which CIL can be applied, and of the methods that govern its identification.[1773] German courts in particular have engaged in high-quality reasoning on CIL.[1774] Japanese courts have looked at State practice and *opinio juris*, and their reasoning appears to be more detailed with respect to CIL than for treaty law.[1775] In its famous *Paquete Habana* decision of 1900, the US Supreme Court conducted an exceptionally comprehensive (though not uncontroversial) analysis of State practice, predominantly based on scholarly writings.[1776] All in all, however, courts tend to shirk the analysis of State practice and *opinio juris*. Relatedly, some courts have sought to avoid the application of CIL by using a particularly demanding standard to appraise the criterion of the generality of State practice.[1777] English judges have been more detached from the 'consensus' requirement (by which they presumably allude to the generality that State practice must display). They have called it 'a fiction', and they have emphasized the need to identify custom 'as best they can', based on available resources.[1778] This shows that detailed reasoning does not necessarily serve the application of international law. Of course, whether this reasoning respects the sources of international law is a different question.

To establish the existence of CIL, domestic courts usually rely on auxiliary means instead of gathering more immediate evidence of State practice and *opinio juris* (eg official statements or other acts of State organs). A first

1773 de Jonge (n 1387) 46 f. See also Beaulac and Currie (n 1385) 139; Reinisch and Bachmayer (n 1074) 10 ff.

1774 Eg *German Holder of Greek State Bonds v. Hellenic Republic*, Second instance judgment, 5 U 98/14, ILDC 2427 (DE 2014), 4 December 2014, Germany; Schleswig-Holstein; Higher Regional Court [OLG], at para 42 f; *Anonymous*, Individual constitutional complaint, 2 BvR 1506/03, BVerfGE 109, 13, NJW 2004, 141, ILDC 10 (DE 2003), 5 November 2003, Germany; Constitutional Court [BVerfG], at para 42 ff.

1775 Takashiba (n 1383) 220.

1776 *Paquete Habana*, Decision, No 395, No 396, 175 US 677 (1900), 20 S.Ct. 290 (1900), 44 L.Ed. 320 (1900), ILDC 392 (US 1900), 8 January 1900, United States; Supreme Court [US].

1777 Regarding South African courts under apartheid: ILA, '(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15) 17.

1778 *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529 (CA) 550, at 364 (Lord Denning), cited in Staubach (n 1265) 118.

auxiliary means that is commonly used is scholarship.[1779] Scholarly writings to which courts resort for the purposes of identifying custom are often domestic[1780] or stem from neighboring States.[1781] A second type of auxiliary means courts consult is national and international case law.[1782] Besides these auxiliary means, courts commonly rely on treaty law.[1783] Some judges explicitly acknowledge and privilege the use of these resources. Australian judges for instance consider that CIL is 'evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decision [sic]',[1784] a statement originally made by English courts.[1785] Using these materials is explicitly permitted by the ILC's draft conclusions on CIL.[1786] However, it can become

1779 Reinisch and Bachmayer (n 1074) 39 ff; Hegde (n 46) 69. Many ILDC entries confirm this statement and cannot all be cited here, eg *Maritime Union of Australia, Re; Ex Parte CSL Pacific Shipping Incorporated, CSL Pacific Shipping Incorporated v. Australian Industrial Relations Commission and Others*, Application to the Full Court of the Australian High Court, [2003] HCA 43, (2003) 200 ALR 39, ILDC 204 (AU 2003), 7 August 2003, Australia; High Court [HC]; *Anita W v. Johannes Adam II, Prince of Liechtenstein*, Final appeal/cassation, 7 Ob 316/00x, ILDC 1 (AT 2001), 14 February 2001, Austria; Supreme Court of Justice [OGH], at para 11.

1780 Regarding French courts: Stirling-Zanda (n 102) 12. See also *Re Víctor Raúl Pinto, Re, Pinto* (*Víctor Raúl*) *v. Relatives of Tomás Rojas*, Decision on Annulment, Case No 3125-04, ILDC 1093 (CL 2007), 13 March 2007, Chile; Supreme Court, at para 29.

1781 Eg Reinisch and Bachmayer (n 1074) 39. See also *Municipality of Bergen v. Regional Government of Düsseldorf*, Appeal judgment, 4 C 3.07, BVerwGE 132, 152, ILDC 2745 (DE 2008), NVwZ 2009, 452, DÖV 2009, 422, 16 October 2008, Germany; Federal Administrative Court [BVerwG], at para 20.

1782 Iovane (n 182) 612 ff. See eg *Public Prosecutor v. F*, First instance, Criminal procedure, LJN: BA9575, 09/750001-06, ILDC 797 (NL 2007), 25 June 2007, Netherlands; The Hague; District Court. According to the reporter, the Court 'should have been somewhat more cautious' when it relied on a ruling of the ICTY to ascertain customary international law. See also the comprehensive materials used in *Argentine Necessity Case, K and Others v. Argentina* (*Represented by President Néstor Kirchner*), Decision of the Federal Constitutional Court, Order of the Second Senate, 2 BvM 1-5/03, 1, 2/06, vol 118, 124, 60 NJW (2007), 2610, 138 ILR 1 (2010), ILDC 952 (DE 2007), 8 May 2007, Germany; Constitutional Court [BVerfG], and *S v. Ministro de Economía Hipolito Yrigoyen*, Final decision, 2 BvM 9/03, BVerfGE 117, 141, NJW 2007, 2605, WM 2007, 57, DVBl 2007, 242, BB 2007, 206, ILDC 465 (DE 2006), 6 December 2006, Germany; Constitutional Court [BVerfG], at para 59 ff.

1783 Nwapi (n 1388) 55. See also *Office of Public Prosecutor of the Free and Hanseatic City of Hamburg v. CM and Others*, Judgment, 603 KLs 17/10, ILDC 2390 (DE 2012), BeckRS 2013, 07408, 19 October 2012, Germany; Hamburg; Regional Court [LG], at para 749 f.

1784 de Jonge (n 1387) 46.

1785 *The Christina* [1938] AC 485, 497, Lord MacMillan.

1786 See draft conclusions 6(2), 10(2), and 11, ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

problematic from the perspective of legality, eg if courts rely on insufficient, outdated, or purely domestic material. Relatedly, reasoning that is based on non-compelling resources threatens the predictability, clarity, and consistency of judicial decisions.

A striking and troubling feature of the domestic case law on CIL is its self-referential and even circular aspect.[1787] The risk of circularity is perhaps even more acute in the context of CIL than for other sources, given that domestic rulings can provide evidence of State practice and *opinio juris* and, *qua* auxiliary means, assist interpreters in identifying norms of CIL (*supra*, Chapter 4, section 3, and *supra*, section 1). And indeed, courts tend to predominantly (or even solely) refer to their own State's practice and *opinio juris* and to their own case law, in lieu of establishing the existence of the constitutive elements of CIL or the meaning of a customary norm on the international plane.[1788] They especially tend to cite their previous case law (or that of other courts of their State) to identify custom,[1789] which represents an even more pronounced form of self-referentiality (what I call circularity). This circular and/or self-referential reasoning even concerns courts known for having, in some decisions at least, provided detailed accounts of State practice and *opinio juris*, eg the BVerfG.[1790] In some Commonwealth States, courts have relied on English case law to determine CIL,[1791] which represents a looser form of self-referentiality, but self-referentiality nonetheless, unless a regional custom is being ascertained. Circularity (courts' reference to their own practice) and self-referentiality (courts' reference to the practice of their own State) are side effects of domestic courts' 'peculiar double nature', as described by the ILA Study Group on Domestic Courts: domestic judges generate State practice, but they must also identify what State practice is to interpret international law[1792] (*supra*, Chapter 4, section 3). Circularity and self-referentiality are also encouraged by the fact that

1787 On this issue, see Besson and Ammann (n 60) 125 ff.

1788 See Iovane (n 182) 609; Stirling-Zanda (n 102) 9.

1789 See (among other examples found in ILDC): *Research Foundation for Science Technology and Natural Resources Policy v. Union of India and Another*, Appeal of monitoring committee recommendation, Writ Petition (civil) 657 of 1995, ILDC 385 (IN 2005), 1 May 2005, India; Supreme Court. See also de Jonge (n 1387) 43 f; Stirling-Zanda (n 102) 9, 17.

1790 See Stirling-Zanda (n 102) 14.

1791 Eg in Australia: *The Queen v. Disun*, Appeal against conviction, [2003] WASCA 47, (2003) 27 WAR 146, [2004] ALMD 703, ILDC 2054 (AU 2003), 7 February 2003, Australia; Western Australia; Supreme Court [WASC]; Court of Appeal [WASCA]; Court of Criminal Appeal (historical).

1792 ILA, 'Working Session Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61) 3.

courts may have a domestic legal duty to follow judicial precedents or, in the absence of a doctrine of *stare decisis*, because domestic law requires their decisions to be reasonably consistent with previous cases.[1793] Regardless of these explanations, courts' identification of international law based on their own precedents risks disregarding the sources (and evolution) of international law.

2.2 *Swiss Courts and the Interpretation of Customary International Law*

After this cursory overview of the domestic judicial practice of CIL (*supra*, 2.1), I analyze the Swiss judicial practice of CIL based on the methods these courts use, and based on the reasons they give to justify their interpretations.[1794] Relevant cases were identified via keywords.[1795] In addition, I conducted specific searches (through keywords such as 'Staatenpraxis', 'pratique internationale', and 'tendances internationales') to examine how courts refer to concepts linked (even loosely) to CIL, and to avoid missing relevant cases.

I have described the potential and limitations of keyword searches in other work.[1796] One difficulty that must be stressed again in the context of CIL is courts' imprecise terminology. This makes it hard to determine whether judges are actually referring to CIL.[1797] Terms deemed too vague (eg 'the law of nations', or 'general international law') were excluded from the search. This terminological difficulty is not as acute in the case of treaty law, which courts usually mention through relatively precise (though inconsistent) language (agreement, treaty, convention, etc.).

Another factor that complicates the search is that Swiss judicial databases do not provide lists of decisions pertaining to CIL, contrary to what is the case

1793 Besson and Ammann (n 60) 37.

1794 For a comprehensive study of the practice of the Swiss authorities pertaining to CIL, see ibid. The study references a number of rulings that are also discussed in the present book.

1795 The keywords used (regardless of grammatical variations) are: Völkergewohnheitsrecht, völkergewohnheitsrechtlich, völkerrechtliches Gewohnheitsrecht, internationales Gewohnheitsrecht, droit international coutumier, droit coutumier international, coutume internationale, *opinio juris*, *opinio iuris*, diritto internazionale consuetudinario, diritto consuetudinario internazionale. Cantonal cases were surveyed in the language in which courts conduct their proceedings (German for Zurich and Basel-Stadt, French for Geneva, and German and French for the canton of Bern).

1796 Ammann, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (n 5).

1797 Examples abound. In BGer, judgment 2P.36/2004 of 9 May 2005, at 5.6, for instance, the Court states that art. 31(1) VCLT reflects the 'general principles of customary international law'. More generally, see ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891) 123 para 2.

with treaty law (at least for federal court databases). CIL also lacks an identifier in the Systematic Compilation of Federal Legislation, contrary to treaties, which courts often cite with their designated number in the compilation. The descriptors (or tags) on CIL attributed to some decisions of the Swiss Federal Tribunal were insufficient for the purposes of this study, given the few decisions tagged.

As was the case with treaty law, I examine the interpretative practice of the Swiss Federal Tribunal (2.2.1), of other federal courts (2.2.2), and of selected cantonal courts (2.2.3) and military tribunals (2.2.4). I also highlight the parallels between the methods Swiss courts use to interpret domestic and international custom (2.2.5). I then compare the practice of these different Swiss courts (2.2.6). Lastly, I examine the similarities and differences between the Swiss case law and the practice of other domestic courts (2.2.7).

2.2.1 The Swiss Federal Tribunal

Given the relatively few cases in which the Court has applied CIL,[1798] a diachronic analysis is unwarranted. The small number of cases also makes it difficult to identify the Swiss Federal Tribunal's approach to the four interpretative methods (text, context, object and purpose, and history). The methods are rarely explicitly mentioned (or acknowledged as customary) in the case law, even if they must guide the identification of State practice and *opinio juris* (*supra*, Chapter 6, section 2). In fact, as I will show, these two constitutive elements are largely absent from the Swiss judicial practice as well. Both interpretative methods and constitutive elements are more salient in cases on domestic custom (*infra*, 2.2.5).

Instead of looking at the evolution of the Court's case law over time, it is more compelling to take the substantive areas of international law in which the Court has referred to CIL as our angle of analysis. Relevant rulings mainly pertain to four substantive areas: the law of treaties, migration and refugee law, the law of immunities, and IHRL. While these subject matters sometimes overlap, they are useful for breaking down and evaluating the case law.

1798 Ie, in comparison to cases dealing with treaties. See Ammann, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (n 5). The number of cases on CIL taken into account in this chapter is higher than the figures provided in this previous empirical study I conducted, since the present chapter includes rulings of the Swiss Federal Tribunal not published in the official compendium.

CIL is often mentioned in connection with the law of treaties.[1799] This is symptomatic of the role treaties play in practice to interpret custom, and *vice versa*. This role is endorsed by the ILC's draft conclusions on custom,[1800] and it is visible in the practice of the Swiss authorities at large.[1801]

A first cluster of cases includes rulings that refer to the VCLT. A representative example of the Court's way of identifying custom is provided by a decision of 1986, in which the Swiss Federal Tribunal stated that the VCLT's provisions are applicable to intercantonal agreements if no other domestic legal provision governs the issue, and to the extent these provisions codify 'recognized customary international law'. It then applied art. 46 VCLT, noting that this provision reflected a position that had become dominant in international law in recent decades.[1802] In this decision, the Court stressed that Switzerland had endorsed this norm, citing acts of the Swiss government and of two ministries.[1803] As will become apparent, this tendency to emphasize the Swiss practice – which, *per se*, does little work, if any, from the perspective of the identification of customary *international* law – is common in the Swiss case law. While such references to the Swiss practice serve the purposes of reinforcing the (sociological and intrastate) acceptance of the Court's rulings, this trend is problematic from the perspective of legality. In this decision, the Court also mentioned rulings of international courts and arbitral tribunals.[1804]

In another case, the Court noted that the principles codified in art. 31(1) VCLT are 'essentially' a codification of CIL, and that they are consistent with its own existing case law.[1805] The customary character of the VCLT's methods has been reiterated in later cases.[1806] In a judgment of 2018, the Swiss Federal

1799 On the links between treaties and CIL: ILC, 'First Report on Formation and Evidence of Customary International Law by Special Rapporteur Sir Michael Wood' (n 185) 15 para 34; ILC, 'Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (n 294) 14 ff para 27 ff; Besson and Ammann (n 60) 55 ff.

1800 Draft conclusions 6(2), 10(2), and 11, ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

1801 Besson and Ammann (n 60) 55 ff.

1802 BGE 112 Ia 75, at 4 c).

1803 Ibid.

1804 Ibid.

1805 BGE 122 II 234, at 4 c). See also BGer, judgment 4P.114/2006 of 7 September 2006, at 5.4.1.

1806 BGE 141 II 447, at 4.3.1. See also (regarding art. 31(1) VCLT) BGer, judgment 2P.36/2004 of 9 May 2005, at 5.6. In other rulings, the Court states that treaties must be interpreted 'based on customary international law and the international law of treaties'. See BGer, judgment 2C_498/2013 of 29 April 2014, at 5.1.

Tribunal stated that even if India, one of the parties to the dispute, had not ratified the VCLT, the Convention's provisions on treaty interpretation were applicable *qua* customary international law.[1807] The Court has also affirmed the customary character of art. 26 and 27 VCLT,[1808] which have been increasingly prominent in cases dealing with conflicts between domestic and international law. The Court occasionally points out that the Convention is customary without differentiating between its provisions.[1809] This is problematic with regard to both the legality and the quality of the Court's reasoning.

CIL is also mentioned in relation to aspects of treaty law other than the VCLT. Under specific conditions, and as already noted, the Court applies customary principles of treaty law to intercantonal agreements by analogy.[1810] Moreover, it frequently states that a given treaty provision has the status of CIL and *vice versa*, presumably to emphasize the legality of its interpretations. On the other hand, the Court also highlights instances of divergence between these sources. It has for example observed that the Vienna Convention on State Succession in Respect of Treaties, which Switzerland has not ratified to date, contains norms departing from CIL.[1811] In this case, the Court noted that the automatic continued validity of treaties was not supported by CIL, and that there was no unitary State practice when the Convention was adopted in 1978. In support of this statement, the Court cited writings of Swiss and foreign legal scholars, and the digest of the Swiss practice of public international law published annually in the Swiss Review of International and European Law.[1812] The Court then referred to its own case law.[1813] The decision is illustrative of the self-referential character of the practice of domestic (including Swiss) courts (see also *supra*, 2.1). It exemplifies Swiss courts' imprecise terminology, since the Court uses the term 'general international law' as a synonym for 'customary international law'.[1814] In another earlier case, the Court stated that there was no CIL prescribing an automatic continuation of treaties, without substantiating this statement.[1815] This seems insufficient from the perspective of both legality and high-quality judicial reasoning.

1807 BGer, judgment 4A_65/2018 of 11 December 2018, at 2.4.1.
1808 BGE 125 II 417, at 4 d); BGE 142 II 35, at 3.2.
1809 BGE 120 Ib 360, at 2 c).
1810 Eg BGE 96 I 636, at 4 c).
1811 BGE 139 V 263, at 4.2.3.
1812 Ibid.
1813 Ibid, at 4.2.4.
1814 Ibid, at 10.2.
1815 BGE 105 Ib 286, at 1 c).

A second subset of cases pertains to migration and refugee law. In a well-documented decision of 1985, the Swiss Federal Tribunal held that the principle of non-refoulement has the status of CIL.[1816] It based this statement on Swiss and international legal scholarship, on a digest of the ECtHR's case law, and on a decision published in the official digest of the Swiss federal administrative practice. Once again, the case illustrates the self-referential character of the case law. In a decision of 1997, the Court laconically noted that CIL does not give foreign nationals the right to be granted entry by a State.[1817] In the landmark (and politically sensitive) *Spring* judgment, the Court stated that in the 1930s, neither Swiss nor international law gave rise to a State duty to grant asylum, and that the *ad hoc* approach adopted by the League of Nations with regard to this issue showed that there existed no customary definition of refugee at the time.[1818] The Court exclusively relied on the writings of Swiss scholars and experts to justify this statement. This approach seems insufficient, especially given the gravity of the issue at stake. The Swiss Federal Tribunal added that at the time of the facts of the case, non-refoulement was not a mandatory principle of CIL. It then cited the writings of foreign and Swiss legal scholars,[1819] which confirms the important place of scholarship in the case law. The Court further noted that based on 'Swiss conceptions as well', the prohibition of genocide had the status of mandatory CIL.[1820] This argument can, at best, demonstrate the compliance of Swiss authorities with this prohibition, but not its customary status.

A third substantive area of CIL that is particularly prominent in the Court's case law is the law of immunities.[1821] The cases on the issue provide interesting insights into the Court's method. In a particularly detailed, well-researched decision of 1980, the Court held that the principle of qualified (as opposed to absolute) immunity reflected CIL. The evidence cited in support of this statement is relatively extensive, compared to the laconic style of many Swiss rulings on CIL. It consists of several writings by Swiss and foreign legal scholars and two decisions issued by the BVerfG. The Court also noted that only 'Great Britain and the socialist States' did not endorse this principle.[1822] Finally, it

1816 BGE 111 Ib 68, at 2 a). See also BGer, judgment 1A.212/2000 of 19 September 2000, at 5 a).
1817 BGE 123 II 472, at 4 d).
1818 BGE 126 II 145, at 4 c) aa).
1819 Ibid, at 4 c) bb).
1820 Ibid, at 4 d).
1821 For a recent example, see BGer, judgment 1B_258/2017 of 2 March 2018, at 9.2.
1822 BGE 106 Ia 142, at 3 a).

acknowledged that the requirement of a 'Binnenbeziehung' established by the Swiss Federal Tribunal did not have the status of CIL.[1823] This last statement contrasts with other rulings in which the Swiss practice is presented as conclusive evidence of custom.

In a case pertaining to the respective immunities of Switzerland and Italy, for instance, the Court stated that 'unwritten rules of international law' are 'reflected in scholarship and judicial decisions, for Switzerland especially in those of the Swiss Federal Tribunal'.[1824] The Court has also done so in another case pertaining to the law of immunities, this time involving Turkey.[1825] The aforementioned extract confirms domestic courts' tendency to use their own practice to interpret CIL, and their imprecise terminology. The Turkish case is remarkable for its mention of foreign State practice. In fact, even such brief comparative considerations are rare in the case law,[1826] as paradoxical as this may seem considering the importance of State practice for the formation (and, therefore, the identification) of CIL.

Another example of self-referentiality in the law of immunities is a decision of 1989 involving the Filipino dictator Ferdinand Marcos, in which the Court noted that CIL has always granted personal inviolability and immunity from criminal jurisdiction to heads of States, their family, and their suite. To support this statement, the Court used textbooks and the yearly digest of the Swiss practice of public international law.[1827] Scholars like Simonetta Stirling-Zanda have praised this digest, remarking that it is a valuable aid for Swiss legal officials called to identify CIL.[1828] Yet this should not detract from the fact that exclusively relying on the practice of the Swiss authorities is, as previously mentioned, self-referential, and potentially even circular. It can also be an expression of deference to the practice of these authorities (and especially of the executive) which is unwarranted from the perspective of the sources and interpretative methods of international law.

With regard to some issues of the law of immunities, the case law lacks precision. In a decision of 1984, the Court clarified that while it had previously stated that the European Convention on State Immunity reflected the development of international law,[1829] this did not mean that it reflected CIL.[1830]

1823 Ibid, at 3 b). See also BGE 135 III 608, at 4.2.
1824 BGE 111 Ia 52, at 3.
1825 BGE 104 Ia 367, at 2 a).
1826 Ibid, at 2 d). For another example, see BGE 132 II 65, at 3.5.
1827 BGE 115 Ib 496, at 5 b).
1828 Stirling-Zanda (n 102) 16.
1829 BGE 111 Ia 52, at 3.
1830 BGE 110 II 255, at 4 c).

Instead of analyzing State practice and *opinio juris*, the Court used its own case law. It thereby opted for a potentially circular line of reasoning that does not univocally disclose the reasons underpinning the Court's interpretation. The lack of customary status of said Convention has not prevented the Court from referring to it *qua* 'expression of modern Western European conceptions' in some cases.[1831] In later rulings, the Court has been more reluctant to confirm the Convention's customary character.[1832]

In contrast to its cautious attitude vis-à-vis the customary status of the European Convention, the Court has affirmed the customary character of the UN Convention on the Jurisdictional Immunities of States and Their Property (UNCSI). The UNCSI's text was adopted in 2004, and Switzerland ratified the Convention in 2010. As of June 2019, the Convention had not entered into force. For these and other reasons, its customary status is controversial.[1833] The Court nonetheless noted in several decisions that the UNCSI 'purports to be a codification of customary international law',[1834] a formulation which is anything but clear. It did not substantiate this statement, except via a scholarly piece[1835] and its own previous case law on the UNCSI.[1836] Given the implications of this interpretative conclusion, offering additional reasons is necessary from the perspective of legality and high-quality judicial reasoning.

In a judgment of 2017 involving the Syrian central bank, the Court left open whether art. 6(1) UNCSI had the status of CIL.[1837] In another case on the UNCSI, the Court examined the finding of the Geneva Supreme Court's Labor Law Chamber that art. 11 UNCSI codified CIL. The Court upheld this interpretation, stating that since Switzerland had ratified the Convention, it was 'justified to use it as an inspiration when making a decision based on the general rules of international law of jurisdictional immunities'.[1838] While an 'inspiration' is

1831 BGE 104 Ia 367, at 2 a). See also BGE 111 Ia 52, at 3.

1832 BGE 120 II 400, at 3; BGE 134 III 122, at 5.1. See also BGer, judgment 4A_331/2014 of 31 October 2014, at 3.2.

1833 Eg Riccardo Pavoni, 'The Myth of the Customary Nature of the United Nations Convention on State Immunity: Does the End Justify the Means?' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018). On this issue, see Besson and Ammann (n 60) 65 ff.

1834 BGE 134 III 122, at 5.1; BGE 136 III 575, at 4.3.1; BGer, judgment 4A_541/2009 of 8 June 2010, at 5.5; BGer, judgment 4A_331/2014 of 31 October 2014, at 3.1.

1835 BGer, judgment 4A_541/2009 of 8 June 2010, at 5.5; BGE 134 III 122, at 5.1.

1836 BGer, judgment 4A_541/2009 of 8 June 2010, at 5.5.

1837 BGer, judgment 2C_820/2014 of 16 June 2017, at 4.5.

1838 BGer, judgments 4A_542/2011 and 4A_544/2011 of 30 November 2011, at 2.1.

likely not decisive, the ruling fails to convince. It suggests, once more, that the Court interprets CIL primarily based on the Swiss practice.

One could also read a self-referential tendency in the Court's finding that the Federal Act on the Privileges, Immunities and Facilities, and the Financial Subsidies Granted by Switzerland as a Host State codifies CIL.[1839] Other cases on the law of immunities simply affirm the customary status of some treaty provisions (eg art. 31 and 37 VCDR).[1840] They also occasionally highlight divergences between treaty law and CIL.[1841]

A fourth cluster of cases pertain to IHRL. The Court has stated that some provisions of the UDHR can have the status of CIL, even if the Declaration, *qua* resolution of the UN General Assembly, is not legally binding.[1842] It has concluded – without providing reasons for this conclusion – that art. 26(3) UDHR does not have such a status.[1843] The Court's reasoning is, as in many cases, highly laconic. In rare instances, the Court has referred to the ECtHR's case law on CIL.[1844] The European Court interprets the ECHR based on a 'European consensus', in light of the evolving practices of the Contracting States, and hence in a way that is reminiscent of the ascertainment of CIL.[1845] Therefore, using the Court's case law to identify CIL can be helpful. However, it cannot be used to circumvent the two-tiered test of State practice and *opinio juris*.

CIL has also been mentioned in other substantive domains of international law than the aforementioned four areas.[1846] These cases show that treaties and scholarship play a central role in the Court's reasoning, provided its conclusions about custom are substantiated at all. In a number of cases, the Court has for

1839 Federal Act on the Privileges, Immunities and Facilities, and the Financial Subsidies Granted by Switzerland as a Host State of 22 June 2007 (SR 192.12); see BGer, judgment 4A_331/2014 of 31 October 2014, at 3.3.

1840 BGE 113 Ib 257, at 7.

1841 BGE 115 Ib 496, at 5 c).

1842 BGer, judgment 2C_738/2010 of 24 May 2011, at 3.2.3.

1843 Ibid, at 3.2.3.

1844 It has held that the European Court considers that CIL grants the accrediting State immunity with regard to its own nationals employed in its representations abroad. See BGer, judgment 4A_386/2011 of 4 August 2011, at 7. The Court has also stated, when interpreting the ECHR, that the European Court's case law reflects State practice, see BGE 139 I 16, at 5.2.2.

1845 Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 55 f.

1846 See for instance BGE 129 II 114, a dispute between the canton of Zurich and a private hydroelectric power station on the appropriate amount for a water concession. See also BGE 124 II 293, where the Court considers that CIL prohibits States from engaging in, encouraging, or tolerating activities on their territory that cause substantial environmental damage on the territory of a neighboring State.

example held that CIL prohibits exercises of public authority on the territory of another State without the latter's consent.[1847] Yet the Court's method is so laconic that it is impossible to evaluate its reasoning, except to emphasize its brevity and assertive character.

Exceptionally, the Court has contradicted the executive with respect to its interpretation of CIL. In the *Noga* case, the appellant invoked a legal opinion of the FDFA according to which a renunciation to immunity only affects *acta jure gestionis*. This statement was explicitly rejected by the Court.[1848] This inter-branch divergence is noteworthy, given the deference Swiss courts usually show to the executive in the law of immunities.[1849] In most cases, the Court did not go against the practice of other State organs, at least not explicitly.

2.2.2 Other Federal Courts

2.2.2.1 *The Swiss Federal Administrative Court*

While the Swiss Federal Administrative Court (SFAC) regularly mentions CIL, remarks on its methods of identification are rare. Still, while the Court applies custom less often than the Swiss Federal Tribunal, its rulings on the issue are often more detailed (*supra*, 2.2.1). Some judgments contain remarkably thorough analyses of CIL that are unparalleled in the Swiss judicial practice.[1850]

Like the Swiss Federal Tribunal, the SFAC has mentioned CIL in connection with the law of treaties, and more specifically with the VCLT, usually to highlight the customary character of its provisions. Drawing on scholarship, it has stressed several times that *pacta sunt servanda* and the prohibition to invoke domestic law to justify violations of international law have the status of CIL.[1851] The Court has not engaged in a study of State practice and *opinio juris* in this context. This is likely due to the undisputed character of these principles. The Court has even stated that the principle of *pacta sunt servanda* and the principle of good faith already applied before Switzerland's ratification of

1847 BGer, judgment 2C_19/2017 of 21 September 2017, at 2.1; BGer, judgment 2C_265/2012 of 22 March 2012, at 2; BGer, judgment 2C_197/2011 of 22 March 2011, at 2.1; BGer, judgment 2C_201/2011 of 7 October 2011, at 2.1.

1848 BGE 134 III 122, at 5.3.2 and 5.3.3.

1849 Besson and Ammann (n 60) 49.

1850 SFAC, judgment A-4771/2012 of 2 July 2014, at 7.2.1; SFAC, judgments A-3776/2010 and A-2411/2010 of 16 August 2012, at 6.1.1.

1851 SFAC, judgment B-2183/2006 of 28 August 2007, at 4.3.4; SFAC, judgments B-1277/2007 and B-1279/2007 of 18 September 2007, at 5.7. See also (stressing the CIL status of art. 26 VCLT) SFAC, judgment A-4013/2010 of 15 July 2010, at 4.2; SFAC, judgment A-6695/2010, at 2.2.

the VCLT *qua* CIL.[1852] To support this conclusion, the Court has relied on statements of the federal executive and on international law treatises.[1853] The Court often notes that the VCLT's methods are customary.[1854] While many judgments addressing this matter are repetitive, in the sense that the same paragraph on the VCLT has been copied and pasted into myriad other judgments,[1855] some decisions are remarkably detailed with regard to this issue.[1856] The SFAC has also explained that CIL can be replaced by a new custom or a treaty.[1857]

The Court has affirmed the customary status of treaty provisions in the area of refugee law. It has for example noted that art. 33 of the Refugee Convention has the status of mandatory CIL.[1858] The Court has also observed that even if a State is not a party to the 1951 Refugee Convention, it must respect the principle of non-refoulement based on CIL.[1859] In both cases, the Court does not explain how it identifies this customary status, which is, as in many cases, problematic from the perspective of both legality and quality.

CIL is also used by the SFAC to identify specific sovereign rights which are not as present in the Swiss Federal Tribunal's case law on CIL. The Court has for example considered that the sovereign right to issue passports has the status of CIL.[1860] It has also found that the territory of Campione is part of the Swiss customs territory in virtue of CIL. The SFAC based this conclusion on the practice of the Swiss Federal Tribunal, the Federal Council, and other administrative bodies, and on domestic and international legal scholarship. Remarkably, the Court also relied on statements of the Italian Ministry of Finance and of the

1852 SFAC, judgment B-2869/2014 of 25 February 2015, at 3.2.3; SFAC, judgment A-7789/2009 of 21 January 2010, at 3.3.3; SFAC judgment B-1884/2014 of 13 July 2015, at 3.2.3. Regarding the principle of good faith, see SFAC, judgment A-4695/2015 of 2 March 2016, at 4.3.2.1.

1853 SFAC, judgment B-2869/2014 of 25 February 2015, at 3.2.3; SFAC judgment B-1884/2014 of 13 July 2015, at 3.2.3.

1854 Eg (representative of dozens of other examples) SFAC, judgment A-340/2015 of 28 November 2016, at 4.1.3.6, and at 6.

1855 Eg (and again representative of many other examples) SFAC, judgment A-6391/2016 of 17 January 2018, at 3.

1856 Ibid.

1857 Ibid, at 4.1.3.1.

1858 SFAC, judgment E-3913/2009 of 5 June 2013, at 9.3.1.

1859 SFAC, judgment E-5731/2015 of 5 October 2015, at 6.1; SFAC, judgment F-4270/2016 of 29 September 2016, at 5.2; SFAC, judgment D-4460/2015 of 27 January 2016, at 8.4 (with a citation to a document of the International Rescue Committee and the Norwegian Refugee Council on the legal status of Syrian refugees). See also (noting Lebanon's compliance with this principle) SFAC, judgment D-3429/2015 of 2 July 2015, at 4.2.3.

1860 SFAC, judgment C-6096/2012 of 6 Feburary 2015, at 5.2.2.

European Commission.[1861] These types of acts are hardly ever used by Swiss courts. The Court's ruling goes against the tide, as Swiss courts' reasoning is largely self-referential and/or circular, ie, heavily based on the Swiss practice, while neglecting that of other States.

In rare cases, the Court has elaborated on the two constitutive elements of CIL, State practice and *opinio juris*. Citing the ICJ, it has noted that State practice can be ascertained by examining and comparing appropriate acts of States and through other empirical means, eg acts States perform in the framework of IOs. By contrast, the Court has stated that *opinio juris* is generally ascertained based on State practice. While this seems to conflict with the ILC's emphasis on a separate assessment for each element,[1862] the commentary to the ILC's draft conclusions highlights that the same material can be used to assess both state practice and *opinio juris*, as long as this material is 'examined as part of two distinct inquiries'.[1863] The Court has also mentioned the criteria of coherence ('uniformità'), constancy ('durata'),[1864] and generality ('diffusione geografica').[1865] In most instances, however, and like other Swiss and foreign domestic courts (and even international courts),[1866] the SFAC ignores these two constitutive elements and simply asserts the existence of CIL.

2.2.2.2 *The Swiss Federal Criminal Court*

The Swiss Federal Criminal Court (SFCC) has mostly mentioned CIL in the law of immunities.[1867] While in some instances, the Court only mentions custom in passing, other rulings are more detailed.

1861 SFAC, judgment A-2411/2010 of 16 August 2012, at 5.2.4.

1862 Draft conclusion 3(2), ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

1863 See ibid 129 para 8.

1864 The Court considers that pursuant to the Swiss Federal Tribunal, 10 years of practice are insufficient to generate customary law, especially in fiscal matters. See SFAC, judgment A-4771/2012 of 2 July 2014, at 7.2.2; SFAC, judgments A-3776/2010 and A-2411/2010 of 16 August 2012, at 6.1.2.

1865 SFAC, judgment A-4771/2012 of 2 July 2014, at 7.2.1; SFAC, judgments A-3776/2010 and A-2411/2010 of 16 August 2012, at 6.1.1.

1866 Talmon (n 73).

1867 Eg SFCC, judgment BB.2016.386 of 24 May 2017, at 9.2. Some rulings deal with sovereign rights, analogously to the case law of the SFAC (*supra*, 2.2.2.1). Based on rulings of the Swiss Federal Tribunal, the SFCC has stated that CIL excludes the exercise of public powers by one State on the territory of another State without the latter's consent. SFCC, judgment RR.2011.321 of 30 March 2012, at 5.1; SFCC, judgment RR.2011.247+248 of 1 February 2012, at 2.1; SFCC, judgment RR.2011.176 of 21 November 2011, at 2.1.

Some references to CIL are brief, in the sense that they laconically assert the existence of custom. This can, again, be problematic from the perspective of legality and of high-quality reasoning, though not always.[1868] In a judgment of 2014, the SFCC stated that coercive measures taken in the area of international cooperation in criminal matters can conflict with immunities granted by public international law, adding that sovereign equality applies in interstate relations pursuant to CIL.[1869] This rapid treatment of custom is understandable, given the undisputed character of this customary principle. A more problematic feature of the case is that the Court asserted that in the absence of a treaty between Switzerland and the Holy See, only CIL norms on jurisdictional immunity applied.[1870] However, instead of analyzing State practice and *opinio juris*, the Court referred to the case law of the Swiss Federal Tribunal and to relevant scholarship.[1871] The absence of a detailed review of State practice and *opinio juris* based on various interpretative methods, and the Court's laconic assertions of the existence of CIL, are arguably unproblematic whenever custom is not central to the issue and to the Court's reasoning. This is for example the case when custom is not applied, but merely mentioned in passing and in very general terms.[1872] Yet the boundary between such instances and those where CIL is applied and generates a controversial interpretative issue can be fuzzy. Moreover, a precedent can easily be consolidated by being cited in subsequent cases, even if its reasoning is flawed. This snowball effect makes it important for courts to be careful in their reasoning, even in judgments that do not seem complex.

Other references to custom are slightly more detailed than the examples cited so far, although they do not provide insights into the interpretative methods and constitutive elements of custom. In *Nezzar*, the appellant claimed that the nexus requirement Swiss courts apply in the law of immunities (ie, the requirement for immunity claims to be sufficiently tightly connected to Switzerland in order to be adjudicated) had the status of CIL. The Court stated that CIL 'is based, according to the majority of the doctrine, on a constant, uniform, and general practice of legal subjects, accompanied by the conviction

1868 The SFCC has for example noted, based on the Swiss Federal Tribunal's case law, that the VCDR codifies principles of CIL regarding diplomatic immunities and privileges. See SFCC, judgment BB.2014.19 of 7 October 2014, at 1.7.1.

1869 SFCC, judgment RR.2014.243 of 2 December 2014, at 2.2.1.

1870 Ibid, at 2.2.2.

1871 Ibid, at 2.2.2 and 2.2.3.

1872 Eg SFCC, decision (Beschluss) BB.2014.181–186 of 14 October 2015, at 8.2; SFCC, judgment BB.2013.40 of 13 November 2013, at 3.2.

that this practice is legally obligatory'. It then referred to scholarship and to a report of the Federal Council.[1873] The Court rejected the plaintiff's argument that the nexus requirement was customary. It did so based on the legislative history of a former provision of the SMCC requiring such a nexus, legal scholarship, and the fact that the nexus requirement could lead to violations of the Geneva Conventions. The Court also mentioned the Swiss judicial and administrative practice.[1874] Its other references to CIL in the *Nezzar* judgment are not detailed. In *Adamov*, an earlier case decided in 2007 and pertaining to the immunities of State representatives, the Court mentioned custom jointly with treaty law, its own case law, and legal scholarship.[1875] It also noted 'a tendency to restrict the immunities of State officials with regard to international crimes', citing the landmark *Pinochet* decisions of the House of Lords of 1998 and 1999, and the ICJ's *Arrest warrant* ruling of 2000.[1876] The ruling is remarkable, given how rarely the Court usually refers to the practice of foreign and international courts when ascertaining CIL. Such references are, of course, more likely (and warranted) if a case deals with a CIL issue that is unsettled and in flux. Nonetheless, even in a landmark ruling such as *Nezzar*, the Court's analysis of international legal practice and scholarship can be criticized for being 'somewhat superficial and schematic'.[1877]

2.2.3 Cantonal Courts

2.2.3.1 *The Supreme Court of the Canton of Geneva*

As is the case with the Swiss Federal Tribunal (*supra*, 2.2.1) and the SFCC (*supra*, 2.2.2.2), the Supreme Court of the canton of Geneva has referred to CIL in a number of rulings pertaining to the law of immunities. Based on the Swiss Federal Tribunal's case law, the Court has stated that art. 32 VCDR (on the State's waiver of immunity from jurisdiction) reflects CIL.[1878] It has noted that the status of a foreign State in domestic litigation is governed by CIL, which grants States absolute immunity. The Court has added that 'in Switzerland, this principle has given way to the principle of relative immunity, which is based

1873 SFCC, judgment BB.2011.140 of 25 July 2012, at 3.3.2.

1874 Ibid.

1875 SFCC, judgment RR.2007.73 of 6 December 2007, at 2.2.6.

1876 Ibid. The Court also noted that its own case law was consistent with the ICJ's decision.

1877 Ramona Pedretti, 'Die völkerrechtlichen Immunitäten von Staatsoberhäuptern und anderen Staatsvertretern: Am Beispiel des Nezzar-Falls' (2013) 31 recht 182, 193.

1878 CJ-GE, Chambre des prud'hommes, judgment CAPH/142/2014 of 24 September 2014, at 3.2 and 3.3.

on the distinction between *acta jure imperii* and *acta jure gestionis*'.[1879] This indicates that the Court predominantly looks at the Swiss practice when interpreting custom.

In line with the Swiss Federal Tribunal, the Court has stated that utmost caution is warranted regarding the application of provisions of the European Convention on State Immunity *qua* CIL.[1880] By contrast (and, again, like the Swiss Federal Tribunal), the Court considers that the UNCSI codifies CIL. In two particularly detailed rulings of 2011 and 2012, it reached this general conclusion based on a statement of the Swiss Federal Council.[1881] After acknowledging that the Convention was not yet in force, it cited the ECtHR and the Hoge Raad (Supreme Court) of the Netherlands, which both deem art. 11 UNCSI customary.[1882] Finally, it mentioned the case law of the Swiss Federal Tribunal, based on which the Convention and its art. 11 have customary status.[1883] The references to foreign and international rulings are noteworthy, as they are particularly rare in cantonal case law (but also in the Swiss case law at large). Still, the Court heavily relies on the Swiss practice. In other decisions, it has exclusively cited the Swiss Federal Tribunal[1884] or the Federal Council[1885] to justify the UNCSI's customary character.

Few cases on CIL deal with topics outside the law of immunities. One example is a ruling of 2011 in which the Court stated that public law is subject to the principle of territoriality, except if a treaty, foreign law, or CIL provide otherwise.[1886] Relatedly, in a judgment of 2017, the Court stated that CIL excludes

1879 CJ-GE, Chambre de surveillance en matière de poursuite et faillites, judgments DCSO/209/2016 and DCSO/210/2016 of 30 June 2016, at 2.2; CJ-GE, Chambre de surveillance en matière de poursuite et faillites, judgment DCSO/214/2015 of 13 July 2015, at 2.1. See also CJ-GE, Chambre de surveillance en matière de poursuite et faillites, judgment DCSO/391/2011 of 27 October 2011, where the Court mentions this shift by relying on an article by Christian Dominicé.

1880 CJ-GE, Chambre des prud'hommes, judgment CAPH/59/2014 of 25 April 2014, at 3.1 and 3.2.

1881 CJ-GE, Chambre des prud'hommes, judgment CAPH/53/2012 of 13 March 2012, at 5.2; CJ-GE, Chambre des prud'hommes, judgment CAPH/95/2011 of 7 July 2011, at 5.1.2. See also CJ-GE, Chambre des prud'hommes, judgment CAPH/142/2014 of 24 September 2014, at 3.3.

1882 CJ-GE, Chambre des prud'hommes, judgment CAPH/53/2012 of 13 March 2012, at 5 5.2.2 and 5.2.3; CJ-GE, Chambre des prud'hommes, judgment CAPH/95/2011 of 7 July 2011, at 5.1.4 ff.

1883 CJ-GE, Chambre des prud'hommes, judgment CAPH/53/2012 of 13 March 2012, at 5.2.4.

1884 CJ-GE, Chambre des prud'hommes, judgment CAPH/94/2013 of 15 October 2013, at 4.1.

1885 CJ-GE, Chambre des prud'hommes, judgment CAPH/205/2011 of 30 November 2011, at 4.2.

1886 CJ-GE, Chambre des assurances sociales, judgment ATAS/584/2011 of 13 May 2011.

the exercise of public powers by one State on the territory of another State without the latter's consent.[1887] Given the limited number of substantive areas of international law addressed by the case law on CIL, the Court likely does not refer to custom in areas where it would be relevant. Moreover, the Court has not referred to the two constitutive elements of CIL, nor has it elaborated on the process through which CIL is formed. Its only references to *opinio juris* concern domestic custom (*infra*, 2.2.5).[1888]

2.2.3.2 *The High Court and the Administrative Court of the Canton of Zurich*

Only very few rulings of the High Court and of the Administrative Court of the canton of Zurich refer to CIL. As with many cantonal courts, it is likely that the dearth of case law is due to judges' unease vis-à-vis this unwritten source (see also *supra*, 2.1), to the types of cases brought before cantonal courts, to the relatively small sample of case law available online, and to the limited search options provided by cantonal databases. In line with the practice of other courts, rulings of the High Court and Administrative Court of the canton of Zurich dealing with CIL pertain to subject matters such as the law of immunities, treaty law, and refugee law.

The High Court of the canton of Zurich has cited an extract of a ruling of the Swiss Federal Tribunal pertaining to the so-called 'Binnenbeziehung' (the nexus required by Swiss courts to adjudicate immunity claims).[1889] It has qualified this nexus requirement as (domestic) customary law.[1890] The Court has also invoked CIL (while citing a scholarly piece) regarding the definition of a treaty reservation.[1891] However, the Court's laconism in these cases prevents a detailed assessment of its interpretative methods.

The Administrative Court has noted that the principle of non-refoulement 'is at times attributed to CIL or, in more recent scholarship, to *jus cogens*'.[1892] This statement, if taken literally, could suggest that the Court disregards that CIL and *jus cogens* can overlap. The Court has also held that sending official communications via mail is allowed by CIL,[1893] and that it is 'tolerated by most States'.[1894] This test (toleration) could indicate that the Court does not engage

1887 CJ-GE, Chambre administrative, judgment ATA/458/2017 of 25 April 2017, at 6 b).
1888 CJ-GE, Chambre administrative, judgment ATA/714/2013 of 29 October 2013, at e).
1889 OGer-ZH, judgment PS130067 of 14 May 2013, at 3.5.2; OGer-ZH, judgment PS120238 of 24 January 2013, at 3.4.3.
1890 OGer-ZH, judgment PS130067 of 14 May 2013, at 3.5.3; OGer-ZH, judgment PS120238 of 24 January 2013, at 3.4.3.
1891 OGer-ZH, judgment PS120140 of 5 April 2013, at 5 d).
1892 VwGer-ZH, judgment VB.2001.00128 of 19 June 2001, at 1 c) aa).
1893 VwGer-ZH, judgment VB.2012.00456 of 8 August 2012, at 1.3.
1894 VwGer-ZH, judgment VB.2005.00062 of 21 September 2005, at 4.1.

with the methods of determination of CIL, and that it does not carefully examine the existence of an *opinio juris*. In a ruling of 2017 pertaining to the Swiss–Australian DTA, the Court held that DTAs and treaties more generally were to be interpreted based on treaty law, CIL, and the VCLT.[1895]

Overall, drawing conclusions from such a scarce practice is difficult, apart from the observation that CIL is usually mentioned incidentally.

2.2.3.3 *The Court of Appeals of the Canton of Basel-Stadt*

The Court of Appeals of the canton of Basel-Stadt has only mentioned CIL in passing.[1896] It has analyzed the two constitutive elements of domestic customary law[1897] (on this issue, see *infra*, 2.2.5), but not of CIL.

2.2.3.4 *The High Court and the Administrative Court of the Canton of Bern*

The Administrative Court of the canton of Bern has noted that DTAs must be interpreted based on CIL and the VCLT.[1898] Apart from these few cases, the High Court and Administrative Court of the canton of Bern hardly every refer to CIL.

2.2.4 Military Tribunals

Given the scarcity of cases of the Military Court of Cassation (MCC) on treaty law (*supra*, Chapter 7, 3.3.4), it comes as no surprise that even fewer cases mention CIL. A survey of the MCC's case law from 2006 onwards did not yield relevant cases from the perspective of CIL.[1899] Yet the former art. 109 of the Swiss Military Criminal Code (SMCC) sanctioned violations of the 'laws and customs of war', and its current art. 114 incriminates violations of customary IHL. Hence, CIL can play a role in military criminal law cases.

To identify relevant rulings, I hence relied on auxiliary means and other materials. Helpful resources include the websites of NGOs[1900] or of research

1895 VwGer-ZH, judgment SB.2016.00118 of 31 May 2017, at 2.2.1.

1896 AG-BS, judgments BEZ.2014.9 and BEZ.2014.10 of 23 May 2014, at 3.3.1.

1897 AG-BS, judgment VD.2013.122 of 28 July 2014, at 3.3.3; AG-BS, judgment VD.2012.98 of Feburary 20, 2013, at 4.5.

1898 VwGer-BE, judgment 100 2014 12 of 20 April 2016, at 5.1; VwGer-BE, judgment 100 2017 27 of 1 May 2018, at 4.1; VwGer-BE, judgment 100 2017 24 of 29 June 2018, at 4.1.

1899 As mentioned, this study is based on a survey of the rulings of the MCC available online since 2006 (see <www.oa.admin.ch/de/entscheidungen-militaerjustiz.html>). For reasons of scope, older decisions were not surveyed systematically. To complement the survey of the decisions of the MCC since 2006, relevant decisions were mainly identified via proxies (ie, legal scholarship and other online resources).

1900 In the database of Swiss cases of the NGO TRIAL International (<trialinternational.org>), only the *Nezzar* (SFCC, judgment BB.2011.140 of 25 July 2012) seems relevant from the

institutions[1901] which highlight important rulings (including Swiss rulings) from the perspective of IHL and ICL. What emerges is that few Swiss proceedings have led to a judicial decision. Some scholars have reported on cases pertaining to IHL and ICL, but they do not address courts' interpretative methods.[1902] They merely highlight the difficulty for Swiss judges to apply CIL given its frequent indeterminacy, and the tension this creates with the principle of legality.[1903] This difficulty is also emphasized by the lower military tribunals.[1904]

One of the few military court cases mentioning CIL is the ruling of the Military Court of Appeal in *Niyonteze*.[1905] In this case, the Court noted that the former art. 109 SMCC (which was still in force at the time) sanctioned violations of the laws of war prohibited by treaty law, but also by CIL.[1906] Regarding the latter, the Court referred to 'international norms recognized by the international community', citing a dispatch of the Federal Council of 1967.[1907] This seems to confirm the previously highlighted trend of self-referentiality. Eventually, due to a specificity of the SMCC, the Court did not apply CIL.

2.2.5 Relationship With Interpretative Methods under Swiss Law

What is the relationship between the methods governing the interpretation of CIL and those that apply to the interpretation of domestic custom? In light of the relative richness of the Swiss Federal Tribunal's case law compared to the practice of other Swiss courts, it is on the former that I focus in this subsection.

The similarity of the methods governing the identification of domestic versus international custom is logically entailed by the Swiss Federal Tribunal's

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perspective of CIL. Another resource is the ICRC's website (<www.icrc.org/applic/ihl/ihl-nat.nsf/vwLawsByCategorySelected.xsp?xp_countrySelected=CH>).

1901 Eg <competenceuniverselle.wordpress.com/en-suisse>.

1902 Andreas R Ziegler, 'In re G.' (1998) 92 American Journal of International Law 78; Marc Henzelin, 'La compétence universelle et l'application du droit international pénal en matière de conflits armés : la situation en Suisse' in Laurence Burgorgue-Larsen (ed), *La répression internationale du génocide rwandais* (Bruylant 2003); Andreas R Ziegler, Stefan Wehrenberg, and Renaud Weber (eds), *Kriegsverbrecherprozesse in der Schweiz / Procès de criminels de guerre en Suisse* (Schulthess 2009); Andreas Müller and Stefanie Heinrich, 'Die Strafverfolgung von Völkerrechtsverbrechen in der Schweiz' (2015) 10 Zeitschrift für Internationale Strafrechtsdogmatik 501.

1903 Henzelin (n 1902) 165 f. See also Besson and Ammann (n 60) 96.

1904 Henzelin (n 1902) 170.

1905 <competenceuniverselle.files.wordpress.com/2011/08/niyonteze-tribunal-militaire-dappel-1a-26-mai-2000.pdf>.

1906 Ibid, at 28.

1907 Ibid.

acknowledgment that domestic methods govern the interpretation of all norms that are applicable in the (monist) Swiss legal order (*supra*, Chapter 7, 3.4). However, this similarity is less explicitly acknowledged in its case law than in its interpretation of treaties. The small number of judgments that address the methods of identification of CIL, but also of domestic customary law, likely explain this gap.[1908]

Still, relevant rulings of the Swiss Federal Tribunal show that the basic interpretative methods of domestic and international custom are indeed the same. The Court has occasionally relied on textual interpretation, for instance when assessing whether domestic written law leaves room for customary law,[1909] or simply to demonstrate that a custom exists,[1910] does not exist,[1911] or has been codified,[1912] or to clarify its content.[1913] It has also used systematic interpretation (again, *inter alia* when examining written law and the room it leaves for a domestic custom),[1914] and teleological interpretation (eg when examining the purpose of a practice[1915] or when evaluating whether domestic written law needs to be complemented).[1916] Finally, it has referred to historical interpretation (eg when mentioning the criterion of a sufficient duration of the practice,[1917] but also to identify the historical origins of a customary norm more generally).[1918]

The constitutive elements of domestic and international custom are identical as well, save for some features that hinge on the idiosyncrasies of domestic and international lawmaking.[1919] It is worth noting that when the Swiss Federal Tribunal interprets *domestic* custom (which is a source of Swiss law),[1920] its remarks on the formation and constitutive elements of custom are more detailed than when it deals with CIL. The Court has explained that customary law derives from a lasting, uninterrupted practice and *opinio*

1908 On this issue, see Besson and Ammann (n 60) 94 ff.
1909 BGE 136 I 376, at 5.2; BGE 138 I 196, at 4.5.4.
1910 BGE 88 III 98; BGE 96 V 49, at 4.
1911 BGE 90 I 276, at 3.
1912 BGE 81 I 81, at 4.
1913 BGE 80 I 74 at 2.
1914 BGE 136 I 376, at 5.2; BGE 138 I 196, at 4.5.4.
1915 BGE 136 I 376, at 5.2.
1916 BGE 138 I 196, at 4.5.4.
1917 Eg BGE 136 I 376, at 5.2; BGE 85 I 103, at 3; BGE 84 I 89, at 4; BGE 96 V 49, at 4.
1918 BGE 83 II 345, at 2 (on the historical origins of the customary principle of good faith).
1919 One example is the fact that practice and *opinio juris* are generated by different actors on the domestic versus international plane. Domestic custom can be generated based on the practice of legal officials and individuals, see BGE 83 I 242, at 3; BGE 84 I 89, at 4.
1920 Art. 1(2) SCC.

juris,[1921] and it has only mentioned the concept of *opinio juris* with regard to domestic custom.[1922] The same goes for the conditions State practice must fulfill (ie, coherence, constancy, and generality).[1923]

The practice shows that domestic custom differs from CIL in some respects. Domestic customary law can only emerge if there is a lacuna in domestic written law. Domestic custom cannot contradict written domestic law.[1924] Moreover, it cannot impose new tax obligations on its subjects,[1925] nor can it interfere with fundamental rights.[1926] Again, these peculiarities derive from rules on domestic lawmaking, and they do not affect the congruence of the interpretative methods of domestic and international law.

2.2.6 Comparing the Practice of Swiss Courts

The practices of the various Swiss courts under scrutiny share a number of traits. One such commonality pertains to the subject matter of cases dealing with CIL, namely the law of treaties, refugee law, and the law of immunities. Moreover, courts tend to emphasize the Swiss practice (as opposed to that of other States) when identifying CIL. International courts are seldom mentioned as well. CIL often serves a gap-filling function in the absence of applicable treaty law. Courts also frequently seem to invoke custom to reinforce an interpretative conclusion reached on other grounds. State practice is more frequently analyzed (though, in most cases, superficially) when courts highlight the lack of custom on a given issue. Other common features of the case law are the imprecise terminology used by the courts, an absence of references to State practice and *opinio juris* in an overwhelming majority of cases, and a greater level of detail in high-profile cases, which are rare occurrences.

The Swiss case law is not homogeneous in every respect. Circular reasoning, for instance, is particularly pronounced in the Swiss Federal Tribunal's practice, presumably because it acts as the last judicial instance with regard to many legal issues in the Swiss legal order. This also explains why other Swiss courts tend to refer to the case law of the Swiss Federal Tribunal, and not to

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1921 BGE 119 Ia 59, at 4 b); BGE 94 I 138, at 2 b); BGE 84 I 89, at 4; BGE 83 I 242, at 3, and BGE 81 I 26, at 4 (mentioning the requirement of *opinio necessitatis*); BGE 104 Ia 305, at 4 a), and BGE 102 Ib 296, at 3 f) (*opinio juris et necessitatis*).

1922 BGE 104 Ia 305, at 4 a); BGE 103 Ia 369, at 4 c); BGer, judgment 6B_218/2013 of 13 June 2013, at 3.3.

1923 BGer, judgment 6B_218/2013 of 13 June 2013, at 3.3; BGE 105 Ia 2, at 2 b).

1924 BGE 94 I 305, at 2; BGE 105 Ia 2, at 2 a); BGE 104 Ia 305, at 4 a); BGE 138 I 196, at 4.5.4.

1925 BGE 94 I 305, at 3; BGE 105 Ia 2, at 2 a). On the strict requirements applied to the formation of customary tax law, see also BGE 84 I 89, at 4.

1926 BGE 83 I 242, at 2; BGE 138 I 196, at 4.5.4.

their own. The SFAC has provided the most detailed accounts of the interpretative methods of CIL. Moreover, it has used CIL in relation to sovereign rights, a subject matter which hardly appears in the case law of other Swiss courts. Instances of disagreement between the courts and the executive are exceptional. They primarily concern the Swiss Federal Tribunal. It is important to stress that the scarcity of cantonal cases dealing with CIL makes it difficult to compare this cantonal practice with that of other Swiss courts.

2.2.7 Putting the Swiss Judicial Practice Into Perspective

How does the Swiss judicial practice (*supra*, 2.2.1–2.2.4) compare to that of other domestic courts (*supra*, 2.1), setting aside the differences stemming from States' various constitutional frameworks? Apart from minor divergences, the Swiss case law reflects broader trends on the international plane.

Common features include the fact that CIL is seldom mentioned, and that, when it is, it is often in cases dealing with the law of immunities. Another generally applicable observation is courts' unease regarding CIL, and their reliance on codifications thereof. Other commonalities are the imprecise terminology courts use to refer to CIL, the fact that analyses of State practice and *opinio juris* are rare, courts' frequent reliance on treaties, scholarship, and case law, and their tendency to use their own State's practice regarding CIL.[1927]

Only a few differences can be noted. One such contrast is that few Swiss rulings have addressed the tension that may exist between CIL and the principle of legality. Another one is the absence of Swiss case law pertaining to statutory limitations and their relationship to CIL (a case law that has proliferated in Latin American countries). Moreover, it is likely that judges bound by a doctrine of *stare decisis* are more inclined to cite precedent (usually domestic but also foreign case law) because they are used to consulting relevant cases. The fact that this practice may come less naturally to judges in civil law jurisdictions could explain why courts in Switzerland rarely refer to foreign and international case law.

3 General Principles of International Law

General principles of international law are the *parent pauvre* of the sources of international law if one considers their marginal relevance in international

1927 For a recent publication noticing such trends, see Ryngaert and Hora Siccama (n 229).

legal practice. The ICJ, for example, 'sparingly'[1928] relies on general principles as a source of international law. In line with this trend, domestic courts rarely cite general principles of international law, which makes it difficult to identify and analyze domestic courts' interpretative approach.

After providing an overview of the domestic judicial practice in general (3.1), I examine how general principles of international law are applied by Swiss courts (3.2). I conclude with an evaluation of the Swiss judicial practice regarding both CIL and general principles (4.), with the goal of assessing its legality and quality (*supra*, Introduction, section 3).

3.1 *Domestic Courts and the Interpretation of General Principles of International Law*

From the perspective of the sources of international law, domestic judicial decisions can express States' recognition of general principles of international law (*supra*, Chapter 4, 3.1.3). There is hardly any scholarship on domestic courts' interpretation of general principles of international law, which reflects the paucity of relevant domestic judicial practice in the first place (see already Chapter 6, *supra*). Moreover, due to the imprecise language courts use to refer to general principles of international law, relevant cases are not easily identifiable. General principles of international law are, as previously mentioned (*supra*, 2.1), often confused with CIL.[1929] Some domestic courts refer to general principles, while actually citing treaty provisions.[1930] Treaty law is, of course, useful to ascertain unwritten international law, as the ILC has highlighted.[1931]

Still, domestic courts do at times (though infrequently) refer to general principles of international law.[1932] The ILDC database contains a number of cases pertaining to general principles of international law.[1933] In Russia, Sergei Marochkin and Vladimir Popov note that courts have sometimes referred

1928 Crawford, *Brownlie's Principles of Public International Law* (n 906) 36. See also Sienho (n 73) 489.

1929 Marochkin and Popov (n 183) 230 f. See also ILC, 'First Report on Formation and Evidence of Customary International Law by Special Rapporteur Sir Michael Wood' (n 185) 16 para 36.

1930 Marochkin and Popov (n 183) 232. On the role of treaty law in the determination of CIL, see Besson and Ammann (n 60) 55 f.

1931 ILC, 'First Report on Formation and Evidence of Customary International Law by Special Rapporteur Sir Michael Wood' (n 185) 14 ff para 33 ff. See also draft conclusion 11 in ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

1932 Eg on the Chilean case law: Guzmán Dalbora (n 1727) 539, 543.

1933 As of June 2019, 94 decisions matched the tag 'general principles of international law'.

to this source, albeit without citing a specific principle.[1934] In Canada, the Court of Appeal for Ontario has stated that domestic interpretative methods were not to be relied upon to interpret treaties, unless these methods constituted general principles of international law.[1935] In some jurisdictions, a rich case law has developed on the principle of sustainability and related principles.[1936]

The domestic judicial practice on general principles of international law shares features with the practice pertaining to CIL (*supra*, 2.1). In the area of IHRL, domestic courts have identified a number of general principles of international law, but they have largely neglected States' practice of recognition. They have mostly relied on auxiliary means (scholarship and judicial decisions), as well as treaties, acts of IOs, and soft law.[1937] This disregard for States' practice of recognition is also observed in the context of CIL (where the test applied to State practice is stricter than the looser criterion of 'recognition' that serves to identify general principles of international law). In some cases, courts have provided more details as to the method of identification of general principles.[1938] Another way in which courts' use of general principles is connected to the identification of CIL is that by relying on general principles, domestic courts *circumvent* the two-tiered test of State practice and *opinio juris*.[1939] This

1934 Marochkin and Popov (n 183) 231.

1935 van Ert (n 1385) 182.

1936 Staubach (n 1265) 122.

1937 Eg *Supreme Court of the Republic of Serbia and Others v. People's Assembly of the Republic of Serbia*, Original petition for constitutional review, No 17/2003, ILDC 31 (CSXX 2003), 13 February 2003, Serbia and Montenegro (historical); Federal Constitutional Court (historical); *Filártiga and Filártiga and United States* (*Intervening*) *v. Peña-Irala*, Appeal Judgment, Docket No 79–6090, Case No 191, 630 F.2d 876 (2d Cir. 1980), ILDC 681 (US 1980), 30 June 1980, United States; Court of Appeals (2nd Circuit) [2d Cir]; *Secession of Quebec, Re*, Reference to Supreme Court, [1998] 2 SCR 217, (1998) 161 DLR (4th) 385, (1998), 55 CRR (2d) 1, ILDC 184 (CA 1998), 20 August 1998, Canada; Supreme Court [SCC], at para 114; *Supreme State Prosecutor v. Ribičič* (*Mitja*), Order on Whether to Open Pre-Trial Criminal Investigation, Ks 962/2006, ILDC 523 (SI 2006), 27 June 2006, Slovenia; Ljubljana; Regional Court.

1938 *Argentine Necessity Case, K and Others v. Argentina* (*Represented by President Néstor Kirchner*), Decision of the Federal Constitutional Court, Order of the Second Senate, 2 BvM 1–5/03, 1, 2/06, vol 118, 124, 60 NJW (2007), 2610, 138 ILR 1 (2010), ILDC 952 (DE 2007), 8 May 2007, Germany; Constitutional Court [BVerfG], at para 81.

1939 See Iovane (n 182) 617. This observation has also been made with regard to international courts: Sienho (n 73) 490, with reference to ICJ, case concerning *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), judgment, merits, ICJ Reports 2010, 20 April 2010, 14. See also D'Argent (n 946); Petersen (n 73) 12.

stratagem jeopardizes legality. Finally, courts' terminology is imprecise, and it often conflates general principles of international law and CIL.[1940]

3.2 *Swiss Courts and the Interpretation of General Principles of International Law*

As is the case with CIL (*supra*, 2.2), the small number of Swiss judgments that refer to general principles of international law makes a diachronic study inappropriate. To identify relevant cases, I focused on keywords[1941] indicating a sufficiently explicit, unambiguous reference to a general principle of international law. Vague expressions[1942] were excluded, as they did not clearly establish that courts were actually referring to general principles in the sense of art. 38(1)(c) ICJ Statute.[1943]

This keyword-based approach has drawbacks. Given the imprecise terminology used by the Swiss courts, some pertinent cases may not have been identified. On the other hand, the inflationary use of adjectives such as 'general' and 'principle' in judicial decisions and in legal discourse more generally – and the array of meanings attached to these terms – makes it hard to determine when they are employed to refer to general principles of international law.[1944] To speculate as to whether a given case is actually relevant, is difficult in practice and is likely to lead to overinclusive results. Moreover, even expressions that seem precise are not always used to point to a general principle of international law.

1940 Eg *Italia Nostra v. Ministry of Cultural Heritage and Libyan Arab Jamahiriya* (*Intervening*), Appeal Judgment, Case No 3154/2008, ILDC 1138 (IT 2008), 23 June 2008, Italy; Council of State [Council of State].

1941 The keywords used in the present analysis (taking into account their grammatical variations) are: allgemeine Grundsätze des Völkerrechts, allgemeine Rechtsgrundsätze des Völkerrechts, allgemeine Völkerrechtsgrundsätze, allgemeine Rechtsprinzipien des Völkerrechts, allgemeine Völkerrechtsprinzipien, allgemeine Prinzipien des Völkerrechts, principes généraux du droit international, principes généraux de droit international, principes généraux du droit des gens, principi generali del diritto internazionale, principi generali di diritto internazionale.

1942 Keywords excluded from the scope of this analysis because of their indeterminacy, and that appear in the Swiss case law, include: general principles, principles of international law, principles of the law of nations, unwritten principles of international law, general rules of international law, recognized principles of international law, principles that are recognized internationally, fundamental principles of the law of nations, and principles. On some of these expressions (and others) used by Swiss courts, see Besson and Ammann (n 60) 69, 112 ff.

1943 Courts (and other authorities) often refer to principles *qua* category of norms rather than *qua* sources of international law, for instance. See ibid 21.

1944 On this difficulty, see already ibid 67 ff.

One example of such an ambiguous case is the Swiss Federal Tribunal's ruling in a border dispute between the cantons of Valais and Ticino. The Court held that the 'principles of international law' were applicable to the dispute on a subsidiary basis.[1945] In this exceptionally well documented ruling, the Court referred to a number of 'principles' in connection with international law, yet it did not mention what source of international law it was applying. It is unclear whether it was referring to general principles in the sense of art. 38(1)(c) ICJ Statute.

In the following sections, I discuss, again, the practice of the Swiss Federal Tribunal (3.2.1), the SFAC and the SFCC (3.2.2), and judgments of cantonal (3.2.3) and military courts (3.2.4). I also highlight the convergence of the methods Swiss courts use to interpret general principles of domestic and international law, respectively (3.2.5). I then compare the practices of these various courts with one another (3.2.6), and with those of foreign domestic courts (3.2.7).

3.2.1 The Swiss Federal Tribunal

A first noteworthy feature of the practice of the Swiss Federal Tribunal is that few rulings written in German mention general principles of international law. Rulings in French, by contrast, have referred to them in a number of cases, eg by mentioning the so-called 'principes généraux du droit des gens'. However, as I will emphasize, some of these references serve other purposes than that of invoking the general principles of art. 38(1)(c) ICJ Statute. Moreover, while the Court often cites these principles in passing, it rarely relies on them in its reasoning, nor does it seek to identify whether such general principles are indeed 'recognized' by States, as the ICJ Statute provides.

Second, in a number of rulings, the Swiss Federal Tribunal has used general principles as a fallback source, especially when no treaty provision was applicable.[1946] This reflects the broader tendency of courts and legal authorities to rely on written law whenever it is available, including to identify unwritten international law.[1947] This trend should not detract from the fact that general principles are on equal footing with other sources of international law. In a

1945 BGE 106 Ib 154, at 3.

1946 Eg BGE 110 Ib 173, at 2; BGE 120 Ib 189, at 2 b).

1947 On the role of treaty law to interpret unwritten international law, eg CIL, see ILC, 'First Report on Formation and Evidence of Customary International Law by Special Rapporteur Sir Michael Wood' (n 185) 15 para 34; ILC, 'Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (n 294) 14 ff para 27 ff. See also (with examples taken from the Swiss practice) Besson and Ammann (n 60) 55 ff.

case of 1994, for instance, the Court noted that no treaty between Switzerland and Egypt was applicable and that no 'general principles of supranational rank' governed the issue. The law of immunities consisted largely in domestic law, apart from the minimal protection which CIL accorded to foreign States. The Court concluded that the question at stake had to be resolved 'in light of the general principles of public international law as they can be derived from case law, scholarly writings, and the solutions that have been retained in international treaties governing interstate jurisdictional conflicts'.[1948] However, the remaining parts of the ruling focus on treaty law (and on the issue of whether it reflects CIL) and on the Court's own case law. This shows that courts do not necessarily do what they say, including in terms of interpretative methods. General principles of international law played a similar residual role in a case of 2009 pertaining to the law of immunities. As no treaty was applicable to the case at hand, the Court noted that the cantonal judges had applied the 'general principles of international law'.[1949] In another ruling on the law of immunities, the Court considered that given that the European Convention on State Immunity was not applicable, it had to decide the case based on the general principles of international law.[1950] Confirming courts' tendency to rely on written law, the Court added that these principles had been codified in the UNCSI which, though not yet in force, 'purports to be a codification of CIL'.[1951] The language the Court uses indicates that general principles of international law are conflated with other sources of international law.

Third, the Court sometimes mentions general principles of international law loosely to refer to international law in general. In an extradition case involving Italy, the Court (in a way that is symptomatic of the self-referential tendency of the domestic case law) stated that 'based on Swiss conceptions, general principles of international law are directly applicable *qua* domestic law; when they are of *ordre public* (*jus cogens*), they trump contrary positive treaty law'.[1952] Another example in which the notion of general principles of international law is used loosely is a case pertaining to the Free Trade Agreement between Switzerland and the EEC. The Court held that the Agreement had to be interpreted based on (general principles of) international law, as opposed to EU law.[1953] Similarly, the Court has stated that cases pertaining to

1948 BGE 120 II 400, at 2.
1949 BGE 135 III 608, at 4.2.
1950 BGE 134 III 122, at 5.1.
1951 Ibid.
1952 BGE 117 Ib 337, at 2 a). See also BGer, judgment 1A.63/2002 of 9 April 2002, at 2.1.
1953 BGE 118 Ib 367, at 6 b).

immunity from execution must be decided based on the general principles of international law.[1954] In a series of cases, the Court has noted that when assessing a request for mutual legal assistance in criminal matters, general principles of international law must be taken into account regardless of whether a treaty has been concluded between the States concerned.[1955]

Fourth, and as previously mentioned, general principles of international law are sometimes conflated with other sources of international law, or with specific types of international legal acts, such as *jus cogens*. This ambiguity is, once again, problematic from the perspective of the quality (and especially the clarity) of judicial reasoning. In a ruling of 1995, the Court left open whether the treaty provisions invoked by the appellant qualified as a general principle of international law pursuant to art. 53 VCLT and could, '*qua* norm of the international *ordre public*', motivate the refusal to extradite an individual to the United States.[1956] Yet art. 53 refers to a 'peremptory norm of general international law', and not to general principles of international law as stated by the Court. Another example, this time of the Court's tendency to amalgamate general principles and other sources, is provided by a case of 2014 pertaining to the UNCSI, in which the Court stated that the Convention codifies general principles of international law.[1957] In spite of this language, the Court likely intended to refer to CIL, which it considers to be reflected in the UNCSI (see also *supra*, 2.2.1). The Court has also considered that the prohibition of torture codified in art. 3 ECHR is a general principle of international law which must be taken into account in a request for extradition.[1958] In this ruling, which refers to general principles several times, the Court relied on a previous case allegedly pertaining to the same issue. However, in this earlier case, the Court had mentioned *jus cogens* and not general principles of international law.[1959] The Court has sometimes more neatly distinguished general principles of international law from other sources of international law.[1960]

1954 BGer, judgment 5A_618/2007 of 10 January 2008, at 3.

1955 BGer, judgments 1A.90/2006, 1A.94/2006, 1A.95/2006, 1A.96/2006, 1A.97/2006, and 1A.98/2006 of 30 August 2006, at 1; BGer, judgment 1A.162/2003 of January 15, 2004, at 1; BGer, judgment 1A.166/2003 of 19 January 2004, at 1; BGer, judgment 1A.275/2000 of 8 December 2000, at 1 a); BGer, judgment 1A.74/2000 of 8 March 2000, at 1 a).

1956 BGE 121 II 296, at 3 c).

1957 BGer, judgment 4A_331/2014 of 31 October 2014, at 3.2. See also BGer, judgment 7B.2/2007 of 15 August 2007, at 5.1.

1958 BGE 108 Ib 408, at 8 a). On this issue, see also BGer, judgment 1A.135/2005 of 22 August 2005, at 3.1; BGer, judgment 1A.220/2000 of 28 August 2000, at 2 a). For another example, see BGE 123 II 511, at 7 c).

1959 BGE 101 Ia 533, at 7 b).

1960 BGE 117 Ia 233, at 4 b); BGE 118 Ia 195, at 4 b) aa).

Fifth, in a number of cases, keywords referring to 'general principles of international law' appear in the title of scholarly pieces cited by the Court, but whether they influence the Court's reasoning is unclear.[1961] In one such case, the Court noted that it is a 'principle of the law of nations' that a State can expel foreign nationals who endanger peace and public order, or whose presence constitutes a danger or an inconvenience. It then cited, *inter alia*, Louis Delbez's *Principes généraux du droit international public*, a book pertaining to IHL.[1962] In this case, the Court also stated that the European Convention on Extradition 'expresses general principles common to a number of States'.[1963] Given the laconism of the Court's remarks, whether it is indeed referring to (and seeking to identify) a general principle of international law properly called is unclear.

Sixth, and last, the Court sometimes identifies specific general principles, yet without mentioning their recognition by States pursuant to art. 38(1)(c) ICJ Statute.[1964] It has for example noted that it is a general principle of international law that in a war, reprisals are in principle allowed within certain limits.[1965] To substantiate this statement, the Court exclusively relied on scholarship. The same approach – ie, a focus on scholarhip – can be found in a remarkably detailed case of 2016 pertaining to competition law, the *Gaba* judgment. In this ruling, the Court stated that according to a principle of international law, States can regulate foreign situations to which they have a genuine link.[1966] In another case, the Court, based on its own case law, stated that reciprocity is a general principle of international law.[1967] In an earlier ruling, the Court had indeed qualified reciprocity as such, yet without elaborating on this statement.[1968] While general principles do not require evidence of State practice and *opinio juris*, as is the case with CIL, their existence depends on their recognition by States. Judicial economy obviously precludes courts from engaging in a full-fledged comparative analysis of domestic legal practices, unless the general principle occupies a central place in their reasoning. Such a comprehensive analysis seems especially redundant for general principles that are well established, such as good faith[1969] or sovereign equality. However, not

1961 Eg BGE 100 II 200, at 3; BGE 106 Ib 400, at 10 a).
1962 BGE 106 Ib 400, at 10 a).
1963 Ibid, at 5 c).
1964 Eg BGE 100 II 200, at 2.
1965 BGE 92 I 108, at 3 a).
1966 BGE 143 II 297, at 3.5.
1967 BGE 110 Ib 173, at 3 a). See also BGE 111 V 302, at 5 a).
1968 BGE 109 Ib 165, at 5.
1969 BGer, judgment 2C_806/2011 of 20 March 2012, at 5.2; see also BGE 143 II 224, at 6.3 (with a reference to the ICJ) and 6.5.

all general principles can be taken as axiomatic: some are controversial, and their existence must be demonstrated.

3.2.2 Other Federal Courts

3.2.2.1 *The Swiss Federal Administrative Court*

Unsurprisingly, few decisions of the Swiss Federal Administrative Court (SFAC) mention general principles of international law. In a ruling of 2011, for instance, the SFAC agreed with the lower court's statement that reciprocity was a general principle of international law.[1970] Most of the SFAC's decisions confirm the trends noted with regard to the Swiss Federal Tribunal (*supra*, 3.2.1). Three trends will be discussed here. The first concerns self-referential, repetitive reasoning. Judgments can be considered repetitive when relevant paragraphs are used from one judgment to the other without any adjustment. Another trend is the neglect of the domestic recognition of general principles of international law. The third trend is the use of imprecise terminology.

Many repetitive rulings pertain to the good faith requirement which, under Swiss statutory law,[1971] applies to requests for international administrative assistance in tax matters. In several highly similar cases, the Court has stated that this principle is found in domestic law and (based on its own case law) in the general principles of international law.[1972] The Court has made the same observation when relying on the analogous good faith requirement of the Ordinance on International Administrative Assistance Pursuant to DTAs.[1973] These decisions are all identical in their wording, in line with the repetitive tendency noticed in the context of treaty interpretation (*supra*, Chapter 7, 3.3.1.1). Of course, when cases raise highly similar legal issues, and *a fortiori* for joined cases, it is misguided and unrealistic to require courts to reinvent the wheel in every ruling. On the other hand, an uncritical reliance on analogous cases without questioning the underlying reasoning can create difficulties in terms of the legality and quality of judicial reasoning.

1970 SFAC, judgment B-8732/2010 of 22 September 2011, at 4.3.2.

1971 Art. 7(c) of the Federal Act on International Administrative Assistance in Tax Matters of 28 September 2012 (SR 651.1) states that a request for assistance will not be considered if it violates the principle of good faith.

1972 SFAC, judgment A-6849/2014 of 22 October 2015, at 4; SFAC, judgment A-6337/2014 of 21 October 2015, at 5; SFAC, judgments A-6703/2014, A-6707/2014, and A-6727/2014 of 25 November 2015, at 5; SFAC, judgment A-3387/2015 of 19 February 2016, at 5; SFAC, judgment A-2872/2015 of 4 March 2016, at 5; SFAC, judgments A-3830/2015 and A-3838/2015 of 14 December 2016, at 4; SFAC, judgment A-7143/2014 of 15 August 2016, at 5.

1973 SFAC, judgment A-6983/2014 of 12 January 2016, at 5.

The Court almost never establishes the international recognition of general principles. One exception is a ruling of September 2015, in which the Court first referred to good faith in a case of international administrative assistance. In this decision, it stated that general principles of international law are 'an autonomous source of international law', before observing that good faith was such a general principle. To support this conclusion, the Court mentioned decisions of the SFCC and of the Swiss Federal Tribunal, scholarly writings, and a circular of the Federal Office of Justice.[1974] While the ruling is relatively well documented, the Court merely used the Swiss practice and auxiliary means to establish the existence of a general principle. This confirms, once more, the self-referential tendency of domestic courts interpreting international law.

As has been observed for the Swiss Federal Tribunal (*supra*, 3.2.1), some rulings of the SFAC show that the expression 'general principles of international law' is used loosely. In a decision of 2010, for instance, the SFAC, based on the case law of the ECtHR, stated that art. 8 ECHR must not be interpreted in a vacuum, but in light of the general principles of international law. It thereby referred to general principles as a shorthand for international law. Such imprecise terminology should be avoided, as it jeopardizes predictability, clarity, and consistency.

3.2.2.2 *The Swiss Federal Criminal Court*

Most rulings of the SFCC on general principles of international law follow the case law of the Swiss Federal Tribunal and the SFAC. In a series of identical cases, the Court, based on the practice of the Swiss Federal Tribunal, has stated that reciprocity is a general principle of international law.[1975] It has noted, like the Swiss Federal Tribunal, that 'based on Swiss conceptions, general principles of international law are directly applicable *qua* domestic law; when they are of ordre public (*jus cogens*), they trump contrary positive treaty law'.[1976] The SFCC has also observed (again, like the Swiss Federal Tribunal) that the general principles of international law and reasons of international *ordre public* can preclude extradition.[1977] In other instances, the Court has noted, in line with the SFAC's practice, that general principles of international law are

1974 SFAC, judgment A-6843/2014 of 15 September 2015, at 7.4.3.

1975 SFCC, judgment RR.2007.210 of 30 June 2009, at 5.2; SFCC, judgment RR.2007.208 of 30 June 2009, at 5.2; SFCC, judgment RR.2007.209 of 30 June 2009, at 5.2; SFCC, judgment RR.2007.211 of 30 June 2009, at 5.2.

1976 SFCC, judgment RR.2007.142 of 22 November 2007, at 4.1.

1977 SFCC, judgment RR.2010.132 of 4 October 2010, at 6.2.1.

'an autonomous source of international law'.[1978] The deference of the SFCC on these specific issues can be explained by its narrow jurisdiction, and by the fact that it does not routinely apply international law. However, it can also, at times, suggest a lack of genuine, in-depth engagement with these issues when they do arise.

The SFCC has relied on treaty law to ascertain general principles of international law. It has for example used art. 26 and 31 VCLT and scholarly writings to support its statement that good faith is a general principle of international law.[1979] Yet in none of these cases did the Court explain how such principles were to be ascertained. Again, laconism is understandable when a general principle of international law is undisputed, but it can become problematic as soon as the general principle at stake is less established.

3.2.3 Cantonal Courts

3.2.3.1 *The Supreme Court of the Canton of Geneva*

Decisions of the Court mentioning general principles of international law are extremely rare, and evaluating its practice based on such a small sample is difficult. Still, its case law confirms trends observed in the case law of other Swiss courts, namely terminological imprecision, the use of general principles as a fallback source, and self-referentiality. It is also worth noting that the Court often cites the Swiss Federal Tribunal. While this deference can be explained by the Tribunal's role as an appellate judicial body, it may preclude a thorough engagement of lower courts with the interpretative issue at stake.

In a decision of 2009, the Court concluded that Taiwan 'possesses the elements proper to a State based on the general principles of public international law, ie, a territory, a population, and an effective government'.[1980] Besides relying on scholarship, the Court derived these general principles from the Swiss Federal Tribunal's case law.[1981] It is doubtful that the Court was indeed referring to general principles in the sense of art. 38(1)(c) ICJ Statute. The terminology it uses must hence be taken with a grain of salt. Another example of terminological imprecision is a ruling of 2016 in which the Court listed

1978 SFCC, judgments RR.2017.251–252 of 7 December 2017, at 2.5; SFCC, judgment RR.2013.209 of 14 March 2014, at 4.1; SFCC, judgments RR.2013.203–204 of 28 February 2014, at 3.1; SFCC, judgments RR.2012.82–83 of 26 February 2013, at 2.1.

1979 Ibid. In several cases, the Court describes the principle *pacta sunt servanda* as a general principle of international law before citing art. 26 VCLT: SFCC, judgment RR.2010.286 of 22 February 2011, at 5; SFCC, judgment RR.2011.81 of 21 June 2011, at 4.1; SFCC, judgment RR.2010.279 of 19 January 2011, at 4.

1980 CJ-GE, Chambre civile, judgment ACJC/370/2009 of 20 March 2009, at 3.2.

1981 CJ-GE, Chambre des prud'hommes, judgment CAPH/59/2014 of 25 April 2014, at 3.1.1 ff.

general principles of international law among the sources of international law.[1982] In this case, it referred to the VCLT's interpretative methods as 'general principles of interpretation',[1983] which is symptomatic of Swiss courts' loose terminology.

The self-referential character of the practice, courts' preference for written international law, and their use of general principles as a fallback source, are illustrated by a labor law dispute in which the defendant invoked her jurisdictional immunity. Based on the Swiss Federal Tribunal's case law, the Court considered that utmost care was warranted when applying the European Convention on State Immunity of 1972 *qua* CIL. The claim was therefore to be appraised based on the general principles of international law.[1984] The Court then applied the UNCSI with the understanding, following the Swiss Federal Tribunal's case law and a statement of the Federal Council, that it codified principles accepted by Switzerland.[1985]

3.2.3.2 *The High Court and the Administrative Court of the Canton of Zurich*

Courts in the canton of Zurich hardly ever refer to general principles of international law. Almost no case was found in the online database of the High Court, except for a ruling in which the Court refers to the 'principles of international law' according to which States must respect each other's sovereignty.[1986] A search in the database of the Administrative Court did not yield any results either.

3.2.3.3 *The Court of Appeals of the Canton of Basel-Stadt*

The case law search did not locate any decision in which the Court of Appeals explicitly mentioned general principles of international law. While these results are partly due to the fact that the Court's case law is only available online from 2014, it is plausible that general principles of international law, if they are used at all, are of marginal importance in the Court's decisions.

3.2.3.4 *The High Court and the Administrative Court of the Canton of Bern*

A search in the case law of the High Court and Administrative Court did not yield any results. The Courts sometimes refer to domestic general principles of

1982 CJ-GE, Chambre des assurances sociales, judgment ATAS/495/2016 of 23 June 2016, at 11.
1983 Ibid, at 10 c).
1984 CJ-GE, Chambre des prud'hommes, judgment CAPH/59/2014 of 25 April 2014, at 3.1.
1985 Ibid.
1986 OGer-ZH, judgment SB160062 of 15 December 2016, at 1.2.

domestic law[1987] (like courts in other cantons), but not to general principles of international law.

3.2.4 Military Courts

Given the few rulings of the MCC pertaining to treaty law (*supra*, Chapter 7, 3.3.4) and CIL (*supra*, 2.2.4), it is likely that judgments pertaining to general principles of international law are of minor importance, if they exist at all. A survey of the MCC's recent case law[1988] did not make it possible to identify relevant rulings, nor did a search based on other auxiliary means and resources.[1989]

3.2.5 Relationship With Interpretative Methods under Swiss Law

In this subsection, and similar to what I did for other sources of international law (*supra*, Chapter 7, 3.4 and *supra*, 2.2.5), I focus on the case law of the Swiss Federal Tribunal. The fact that its practice on general principles of international law is not as scarce as that of other Swiss courts makes it easier to compare the methods it uses to interpret both general principles of Swiss law and general principles of international law.

As previously noted, the Court acknowledges that domestic methods govern the interpretation of all norms of the domestic legal order (*supra*, Chapter 7, 3.4). Given the monism of the Swiss legal order (*supra*, Chapter 3, 2.2.1), this arguably entails a convergence of the methods governing the interpretation of general principles of Swiss law and those applicable to general principles of international law. However, this similarity is not as apparent in the case law as in the context of treaty interpretation. General principles of Swiss law are typically mentioned in passing.[1990] Moreover, the Court's inflationary use of the word 'principle' makes it more complicated to establish a convergence of methods.[1991]

Still, this continuity becomes salient in some instances. The Court has for example alluded to the recognition of general principles of domestic law,[1992] eg by scholars and constant case law,[1993] which is reminiscent of the recognition required by art. 38(1)(c) ICJ Statute. The Court has also acknowledged that

1987 VwGer-BE, judgment 200 2014 1185 of 19 October 2015, at 6.3; VwGer-BE, judgment 100 2015 218 of 15 March 2016, at 5.1.

1988 <www.oa.admin.ch/de/entscheidungen-militaerjustiz.html>.

1989 See the resources mentioned in Chapter 7, 3.3.4 (*supra*).

1990 BGE 120 IV 107, at 2 c); BGE 112 II 118, at 5 e); BGE 102 Ib 198, at 2.

1991 Eg BGE 117 II 290; BGE 138 II 191.

1992 BGE 92 I 350, at 4.

1993 BGE 89 I 483, at 6 e). See also BGE 123 I 63, at 4 b) (regarding the constitutional general principles 'developed by the case law of the Swiss Federal Tribunal'), and BGE 99 Ib 371,

some general principles of federal law are also general principles of cantonal law,[1994] which resembles the two levels of general principles in international law, where general principles of domestic law can also be general principles of international law. When interpreting general principles of Swiss law, the Court has used the four interpretative methods. It has engaged in textual interpretation (by pointing to codified expressions of general principles),[1995] teleological interpretation (by emphasizing the point or function of the principle or through evolutive interpretation),[1996] and systematic interpretation (eg by mentioning analogous norms in the legal order).[1997] Occasionally, it uses historical arguments to interpret general principles.[1998]

3.2.6 Comparing the Practice of Swiss Courts

Given the few cases in which general principles of international law are mentioned, it is difficult to reliably identify variations in the practice of different courts. There is virtually no cantonal or military court practice. Nonetheless, except for some minor differences, relevant rulings display a range of shared features.

Common traits of Swiss courts' practice pertaining to general principles of international law are: the use of these principles as a fallback source, when no other source of international law (and especially no written international legal act) is applicable; the absence of remarks as to the recognition and methods of ascertainment of these general principles; the self-referential character of the practice; the imprecise terminology employed by courts; and, finally, repetitive tendencies in the case law, due to the fact that the existence of many general principles is asserted based on previous rulings.

In terms of differences, the subject matters of cases dealing with general principles of international law vary from one court to another (and especially

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at 2. In BGE 108 II 490, at 7, the Court notes that general principles can be 'derived' from the private law order.

1994 BGE 140 III 636, at 3.5.

1995 BGE 138 II 346, at 7, 9; BGE 138 II 191, at 4.3.2; BGE 134 II 117, at 7; BGE 132 V 127, at 6.1.1; BGE 130 II 113, at 4.2; BGE 120 II 243, at 3 d); BGE 118 II 435, at 2 b); BGE 117 V 309, at 4 b); BGE 113 IV 101, at 2 c); BGE 107 II 189, at 3; BGE 98 II 221, at 4 a); BGE 98 Ia 281, at 3; BGE 97 IV 205, at 1; BGE 93 I 666, at 2; BGE 91 I 4, at 2; BGE 84 I 209, at 5; BGE 86 II 365, at 1; BGE 83 II 231, at 2 c).

1996 BGE 134 II 117, at 7; BGE 126 V 143, at 2 b); BGE 116 V 298, at 4 c), d); BGE 98 Ia 460, at 5 a). See also BGE 115 V 347, at 1 d) (concluding that there was no general principle).

1997 BGE 139 V 297, at 3.3.3; BGE 139 V 82, at 3.3.2; BGE 132 V 127, at 6.1.1; BGE 127 V 252, at 4 a); BGE 126 V 244, at 4 a); BGE 124 II 570, at 4; BGE 121 IV 10, at 3 a); BGE 119 Ib 311, at 4 a); BGE 108 V 109, at 2 c); BGE 93 I 666, at 2.

1998 BGE 128 III 370, at 4 b).

from one federal court to another, depending on these courts' jurisdiction). The SFAC adjudicates more cases dealing with tax matters, for instance, and the SFCC is, of course, faced with criminal legal issues. Still, the main subject areas in which general principles are cited are relatively similar across the board. They include the law of immunities, extradition cases, legal assistance in criminal matters, administrative assistance in tax matters, and treaty law. Some cases pertain to the principle of good faith and reciprocity. Besides slight variations in terms of subject matter, one difference is that the SFCC closely follows the case law of the other federal courts, while these other judicial bodies are less deferential in their reasoning. Cantonal courts typically follow the Swiss Federal Tribunal, although their jurisdiction does not prevent them from interpreting general principles.

3.2.7 Putting the Swiss Judicial Practice into Perspective

The small number of relevant cases dealing with general principles makes it difficult to draw meaningful conclusions as to how the Swiss judicial practice fits into the broader practice of domestic courts. What can be noted is that the use of imprecise terminology, the confusion of general principles with other sources and norms of international law, and the mention of general principles jointly with written international law are observed both in Switzerland and abroad.

The only salient difference pertains to the subject matter of cases dealing with general principles. While in other jurisdictions, courts have used general principles in connection with IHRL and international environmental law, for instance, these subject areas are absent in the Swiss judicial practice. On the other hand, the Swiss practice is relatively developed in the law of immunities and administrative assistance in tax matters, two areas that reflect some features of Swiss foreign relations law (*supra*, Chapter 3, 2.1).

4 Evaluation

Based on this survey of the Swiss judicial practice pertaining to unwritten international law (ie, CIL and general principles of international law), several characteristics of the case law can be considered problematic.

1. *Neglect of unwritten law*. First, there is little judicial practice pertaining to unwritten international law. Courts seem biased against it, even though CIL and general principles of international law are autonomous sources of international law. Of course, the scarce practice regarding unwritten international law may also – and *inter alia* – reflect litigants' reluctance

to invoke it in court. Still, the small number of cases (especially as regards cantonal cases and cases decided by military courts) in which unwritten international law is applied suggests that it is neglected when it would be relevant. CIL is only mentioned in some substantive areas of international law, and general principles of international law tend to be used as a fallback source, when no other international legal norm applies. This neglect of unwritten international law may undermine the legality of judicial decisions.

2. *Selective reliance on auxiliary means and insufficient substantiation*. The case law also reveals a generous resort to auxiliary means (especially scholarship) and other resources (such as treaty law) to identify unwritten international law. Granted, reliance on auxiliary means is explicitly allowed by art. 38(1)(d) ICJ Statute, and the ILC explicitly authorizes the use of treaty law, resolutions of IOs, case law, and scholarship to identify CIL.[1999] However, a lack of rigor in the use of this material to interpret international legal acts is problematic from the perspective of the sources of international law and of high-quality judicial reasoning. Another potentially problematic aspect is that legal scholarship often suffers from a geographic (and national) bias. Of course, such preferences are partly due to linguistic considerations, resources, and ease of access, and the use of Swiss scholarship may be warranted when the relationship between international law and domestic law is at stake. However, these reasons do not justify a systematic neglect of other works of scholarship. Finally, a further difficulty is that auxiliary means tend to be used as proxies or shortcuts that replace direct manifestations of State practice (eg official statements or governmental reports). Ryngaert and Hora Siccama rightly talk about domestic courts' tendency to 'outsource the determination of custom to treaties, non-binding documents, doctrine or international judicial practice'.[2000] The existence of custom and general principles is often asserted without much substantiation. Courts provide little evidence (if any) of State practice and *opinio juris* or, in the case of general principles, of their recognition by States. They have asserted the customary character of some international legal norms even when this customary nature is debated on the international plane, and they almost never mention the two constitutive elements of CIL. The fact that these two constitutive

1999 See draft conclusions 11–14, in ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

2000 Ryngaert and Hora Siccama (n 229) 22.

elements are highlighted at least occasionally in the context of domestic custom shows that there is room for improvement with regard to CIL. Analogous remarks apply to general principles of international law.

3. *Circularity and self-referentiality*. The highly self-referential and even circular character of the case law is also problematic from the perspective of the legality and quality of judicial reasoning. Courts tend to refer to the practice of the Swiss authorities in general (or even, more loosely, to 'Swiss conceptions' about international law), and especially to the Swiss judicial practice and to their own case law to identify unwritten norms of international law, as if this domestic practice were decisive in this context. This feature is troubling from the perspective of legality, since international law is generated by interstate lawmaking practices. Ascertaining its meaning requires that courts consult the practice of other States as well. Yet Swiss court cases contain few references to international and to foreign domestic judicial decisions, even though these judicial decisions are as important as domestic ones from the perspective of art. 38(1)(d) ICJ Statute.
4. *Imprecision, irregularity, superficiality, and repetitive reasoning*. Courts' terminology to interpret unwritten international law is imprecise. Both CIL and general principles of international law tend to be conflated with other sources and norms of international law. The practice is also characterized by its uneven level of detail regarding the methods by which unwritten international law is ascertained. Textual, systematic, teleological, and historical interpretative tools are not emphasized in the case law, nor are the constitutive elements of unwritten law. The generally superficial treatment of these issues is particularly salient if one considers the relatively detailed remarks courts have sometimes made regarding unwritten domestic law. Finally, a large number of cases are highly repetitive. Such repetitions partly result from the fact that some cases address highly similar issues, or are even joined cases. However, in other instances, this repetitive practice may indicate courts' lack of genuine engagement with the sources and interpretative methods of international law.

As has become apparent, the main clusters of problems raised by Swiss courts' practice of CIL and general principles roughly mirror those highlighted in the context of treaty interpretation (*supra*, Chapter 7, section 4). Of course, the practice leads to specific difficulties in each case, due to differences between written and unwritten law. Swiss courts' application of CIL also leads to specific difficulties compared to those pertaining to general principles. In spite of these idiosyncrasies, the basic issues encountered are similar for all sources

of international law, be it from the perspective of the legality of the practice, or from the perspective of its quality.

To summarize, in at least four important respects, Swiss courts' interpretation of unwritten international law fails to observe the law's interpretative methods and the virtues of predictability, clarity, and consistency.

Conclusion and Recommendations

1 The Argument Defended in This Book

Lawyers tend to agree that as an empirical matter, domestic courts increasingly often apply international law. The Swiss Federal Tribunal, for instance, is more frequently confronted with this body of law today than in the past, judging from the growing number of references to it in its practice. As I have shown elsewhere, the percentage of rulings of the Swiss Federal Tribunal mentioning international law has more than tripled between 1954 and 2014.[2001]

When domestic courts apply international law – which does not concern all cases in which international law is mentioned – they are required to determine its meaning and, hence, to interpret it. Yet as I have highlighted in this book, domestic judges across the world, including Swiss courts, tend to neglect the interpretative methods required by international law, ie, textual, systematic, teleological, and historical interpretation. Moreover, domestic courts often fail to meet the standards of good judicial reasoning to which both domestic and international law aspire, ie, predictability, clarity, and consistency.

In this book, I have argued why States and their courts must take the interpretative methods of international law more seriously. I have shown that States must do so regardless of their domestic (and especially their constitutional) legal specificities, and that courts must do so irrespective of the outcome of their decisions. I have also stressed that States and their courts can and must do better in terms of reasoning. Courts in particular must strive to provide interpretations of international law that live up to the virtues of high-quality judicial reasoning, ie, predictability, clarity, and consistency. These virtues are not necessarily legal requirements, but our laws and legal practices aspire to fulfill them. Said virtues are used in both domestic and international legal practice to evaluate the quality of interpretations and the degree to which a given decision should influence future interpretations of the law. Importantly, these three virtues serve legality. Disrespecting them means promoting opacity and, thereby, facilitating departures from what the law requires.

2001 Ammann, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (n 5).

Interpretation is an activity that is both free and constrained, and judicial interpretation is no exception (*supra*, Chapter 2). Judicial creativity, in order to respect the law, must respect the frame traced by the law, a frame that includes the law's interpretative methods. Legal interpretation is governed by methods which sometimes also exist in codified form, namely textual, systematic, purposive, and historical interpretation (*supra*, Chapter 6). These methods are customary in domestic and international law. The law's interpretative methods must be obeyed even if they do not determine the interpretative outcome, and even if their neglect does not always trigger a violation of States' international legal obligations. It is worth noting that the law's interpretative methods do not challenge the maxim *jura novit curia*. Instead, they ensure that the law that courts are called to identify is respected.

Both interpretative methods and the virtues of high-quality judicial reasoning may overlap with other legal duties, such as judges' domestic duty to provide reasons for their decisions, or States' duty to interpret treaties in good faith. They may also intersect with other legal and moral principles that apply to judicial interpretation, and especially with the principle of the rule of law, which is both a moral and a legal principle. While these various principles and the questions they raise are undoubtedly important for the activity of domestic courts, their analysis is beyond the scope of this project and must be left for another occasion.

In this book, I have clarified the legal effect of domestic rulings in international law (*supra*, Chapter 4). Bringing the domestic judicial practice of international law in conformity with the law's interpretative methods and with the virtues of predictability, clarity, and consistency matters not only because States must respect international law. It also matters because domestic judicial decisions can contribute to the formation and evolution of international law (art. 38(1)(a)–(c) ICJ Statute), and because they can assist interpreters in ascertaining international law (art. 38(1)(d) ICJ Statute). It is therefore important that domestic rulings actually establish what they are meant to establish, from the perspective of both their legality and quality.

I have also explained why there are good reasons for constraining States (including their courts) in their interpretations of international law (*supra*, Chapter 5). I have identified three main reasons for doing so. First, the frequent vagueness of international law can lead to arbitrariness if there is no legal framework to harness it. Second, in liberal democracies, judges must be accountable to the lawmaker. Third, international law is governed by the principle of auto-interpretation, ie, the principle that every State has the power to interpret its international obligations for itself when no international

court is competent to do so. This power leaves room for self-serving interpretations, and this risk must be mitigated if States are to interact on a level playing field.

I have then described the interpretative methods required by international law in more detail, and I have explained why there are good reasons for using these methods (*supra*, Chapter 6). In this context, I have highlighted the similarity of interpretative methods in domestic and international law, even if the respective characteristics of domestic and international lawmaking can lead to differences in the way these methods are used. This similarity should make courts less skeptical or neglectful of international methods. It should show them that the basic interpretative tools which international law requires States to use are familiar ones. Importantly, these tools must be used and be taken seriously with regard to both domestic and international law.

Finally, I have analyzed the Swiss case law on international law to determine whether it observes said methods and virtues of judicial reasoning. A study of the Swiss judicial practice pertaining to treaty law (*supra*, Chapter 7), customary international law, and general principles of international law (*supra*, Chapter 8) reveals that there is room for improvement from the perspective of the law's interpretative methods, on the one hand, and of high-quality judicial reasoning, on the other hand. I have highlighted four clusters of difficulties that apply to all three sources of international law under scrutiny: (i) courts' disregard or misapplication of the interpretative methods of international law; (ii) the lack of substantiation of courts' interpretative assertions (and, relatedly, their reliance on auxiliary means like scholarship, but not on more direct expressions of State practice); (iii) the self-referentiality and even circularity of the case law (as courts primarily rely on the practice of their own State, on their own case law, and on domestic scholarship, as opposed to the practice and scholarship of other States); and finally (iv) the imprecise terminology and uneven level of detail of domestic courts' reasoning on international law, and the frequent superficiality and repetitiveness of this reasoning.

Of course, not every application of international law raises difficult interpretative issues. In such cases, judges cannot be expected to discuss international legal issues at length. Moreover, judges are constrained in terms of the resources they can resort to. Judicial economy, in particular, requires them to dispose of cases efficiently. These constraints must be factored in when formulating recommendations for improving the practice (*infra*, section 2). However, they are not compelling justifications for leaving things unchanged.

2 Recommendations

The current Swiss judicial practice of international law shows that both the legality and the quality of Swiss rulings need to be improved (*infra*, 2.1). Moreover, given the status of domestic rulings in the sources of international law and as auxiliary means, their accessibility needs to be enhanced (*infra*, 2.2).

I address each of these points in turn, and formulate recommendations on how these goals can be met. While I do not go into the details of the specific organizational measures that would be required within the courts (and beyond) to improve the practice, the recommendations listed below point to the direction in which reforms should go.

2.1 *Improving the Legality and the Quality of Domestic Rulings*

Domestic judicial decisions are not reliable elements of determination of the sources of international law, nor are they reliable auxiliary means to determine the meaning of international law, if they have not been reached in conformity with international law. The same applies to decisions that do not offer predictable, clear, and consistent interpretations of international law. If compliance with international law, its methods, and high-quality judicial reasoning is to be achieved, courts must address and remedy the four clusters of problems identified in this book (*supra*, section 1).

Taking these problems seriously necessitates allocating adequate resources to international legal issues. It also requires deeper institutional reforms. Two major ways of improving the Swiss judicial practice deserve emphasis. They pertain to domestic courts' level of expertise on international law (*infra*, 2.1), but also to specific institutional measures that can strengthen the legality and the quality of their reasoning (*infra*, 2.2).

Before discussing these two points, it is important to acknowledge that the obvious need for efficiency precludes judges from engaging in a full-fledged and textbook-like study of State practice whenever a case touches upon an issue of international law. Nor can we reasonably demand from judges to keep track of all foreign and international case law. Human knowledge about the practice of international law is, by definition, imperfect. On a practical – and important – level, both time and money are, as we all know, finite resources. Thus, when international law is only mentioned in passing without influencing the court's reasoning, or when its meaning is uncontroversial or has been clarified extensively in previous cases, judicial economy and common sense explain why judges do not provide detailed reasoning.

However, there is a fine line between practical (but also rule-of-law-type) concerns about judicial economy, and a systematic, troubling neglect of

legality and quality in judicial decision-making. When ascertaining international law, obvious interpretative mistakes must be avoided, such as the use of domestic *travaux préparatoires* to interpret a treaty, or the neglect of a coherent, constant, and general State practice in the context of CIL. Moreover, high-quality reasoning is arguably just as important as judicial economy. A first step that must be taken to achieve these goals is to strengthen domestic courts' expertise in the field of international law.

2.1.1 Strengthening Courts' Expertise on International Law

To ensure that Swiss courts respect international law and its interpretative methods, and for their rulings to constitute reliable auxiliary means, Swiss courts' expertise on international law needs to be strengthened. Judges with in-depth knowledge of international law should be allocated to chambers in which international legal issues are particularly likely to arise.[2002] Moreover, to analyze international legal issues, judges must be able to collaborate with specialized judicial staff (eg law clerks)[2003] with adequate linguistic and substantive legal skills. Importantly, courts must be able to access a pool of experts within their institution, instead of having to reach out to other domestic authorities. For instance, if Swiss courts consult the Swiss Directorate of International Law and, therefore, the federal executive, their independence may be undermined.

Another important measure that must be taken is to improve the access of courts and their staff to international legal materials and to specialized documentation. This includes platforms such as ILDC and the International Law Reports, which provide summaries of relevant domestic judgments on international law, but also other online databases that grant extensive access to specialized scholarly literature. In this context, it is essential that domestic courts are exposed to a broad range of legal materials that reflects the diversity of national approaches to international law. Access to foreign scholarship, and especially to non-Western scholarship not originally written in English, or not translated into English, is still limited and must clearly be improved. The same applies to the case law of foreign courts: both the ILDC database and the International Law Reports are biased towards Western, English-speaking States. Given domestic courts' prominent place from the perspective of art. 38 ICJ Statute (*supra*, Chapter 4, section 3), an overrepresentation of some States in

2002 On this point, see Bucher (n 264) para 48.

2003 On this topic, see Peter Bieri, 'Law Clerks in Switzerland: A Solution to Cope With the Caseload?' (2016) 7 International Journal of Court Administration 29.

widely used databases means that the practice of these States will be inflated on the international plane.

Specialized training on Switzerland's international obligations and other important topics of international law should be available and even become mandatory for Swiss judges and their staff.[2004] For instance, it has been shown that some treaties ratified by Switzerland are not well-known by the courts.[2005] Swiss courts should also be informed in a regular and systematic fashion about important domestic and foreign cases on international law. Reading up on these topics cannot be left to the initiative of individual judges and law clerks. Instead, institutional incentives are needed.

Yet another way of strengthening domestic courts' expertise and awareness of international legal issues is for judges to foster regular intellectual exchanges with other domestic and foreign judiciaries. Such interactions allow domestic judges to share their knowledge and difficulties, and to discuss cross-cutting international legal issues. While such exchange platforms already exist, they must be used more fruitfully for discussions pertaining to international law specifically.[2006]

It is important to stress that the aim of such measures is not to foster hermeneutic uniformity, in the sense that courts in all States would have to reach the same interpretative conclusion when facing a given international legal issue. This is not what I am arguing for, nor is this what international law and the VCLT require from States. However, domestic courts in all States must respect the sources and interpretative methods of international law. This also means that they must interpret international law with due regard for foreign judicial practices, which contribute to the formation and evolution of international law. Moreover, *qua* auxiliary means, foreign rulings can facilitate domestic judges' interpretative task. If domestic judicial decisions are to contribute to international lawmaking, they must be known to courts in other States.

It is worth noting that advocacy plays an important part in improving domestic courts' expertise on international legal issues. In most cases, lawyers are the ones who raise such issues in the first place, and the contribution their briefs make to the reasoning of domestic courts cannot be underestimated. Skilled advocates with an in-depth knowledge of international law greatly strengthen

2004 For a similar point, see Bucher (n 264) para 49.

2005 This need has for instance been highlighted by the CEDAW Committee: Concluding Observations of the CEDAW Committee, UN Doc CEDAW/C/CHE/CO/3/7, 7 August 2009, para 16.

2006 One example and potential model, in this context, is the Network of the Presidents of the Supreme Judicial Courts of the European Union. See <reseau-presidents.eu/fr/cpcl>.

the legality and quality of judicial decision-making. Domestic courts' expertise in the field of international law can only benefit from lawyers who are trained accordingly and who regularly practice in this field.

In Switzerland, international law does not have a prominent place in advocacy. The great bulk of Swiss law firms do not specialize in public international law, even if a handful of them have developed expertise in this area. One possible explanation for this is that international law is not a formal requirement to pass the bar exam in Switzerland. Moreover, the Swiss legal market is relatively small, so it might not seem worthwhile for law firms – especially for smaller ones – to develop a strong focus on international law.

The lack of emphasis on international law in legal practice, but also in law schools (*infra*), means that lawyers may not always recognize the international law dimensions of their clients' cases. Even when they do, the low profile of international law may lead them to think that invoking international law is unlikely to be successful and that this strategy might even harm their case. Moreover, there is no culture of *pro bono* litigation in Switzerland, and litigation is costly. Thus, many individuals and small or midsized businesses will be discouraged from going to court for financial reasons. As courts can only interpret international law if a corresponding case is brought to them, it can be expected that many questions pertaining to international law will never make it to the courtroom. Thus, for courts' international law expertise to be strengthened, the legal profession must place greater emphasis on, and invest in, international law. In the meantime, it is essential that prominent cases in which international legal issues are raised are well argued. Through the intellectual rigor of their briefs, lawyers can have a significant impact on the Swiss judicial practice and beyond.

One such example of a remarkably well argued, high-profile case is the 'KlimaSeniorinnen' litigation. In this case, the association 'KlimaSeniorinnen Schweiz' (which seeks to ensure that elderly women are protected from the effects of climate change) and four other women argued in great detail that the Swiss government's failure to properly address climate change by taking effective measures for the prompt reduction of CO_2 emissions violated various constitutional rights as well as international human rights law, including art. 2 and 8 ECHR. They also invoked art. 6(1) and 13 ECHR, and mentioned art. 34 ECHR.[2007] After the Federal Department of the Environment, Transport, Energy, and Communications (DETEC) declared their – thoroughly and carefully

2007 The full argumentation is available at <ainees-climat.ch/documents>.

reasoned – application inadmissible,[2008] the KlimaSeniorinnen appealed to the SFAC. The Court rejected the appeal in a brief judgment that hardly engaged with the international legal issues at stake.[2009] At the time of writing (June 2019), the – again, extremely thorough – appeal of the KlimaSeniorinnen before the Swiss Federal Tribunal was still pending.[2010] The extent to which the Court will engage with the appellants' claims pertaining to international law remains to be seen.

Another important way of fostering domestic expertise is through law teaching.[2011] Currently, public international law is, for many law students in Switzerland, a one-time occurrence in the curriculum, usually in the form of a mandatory module at the beginning of their studies. While other law courses sporadically include references to international law (eg to the ECHR), occasional mentions alongside domestic law do not not suffice to strengthen students' international law expertise. Moreover, there is little clinical education and training for advocacy skills at law schools, including in public international law. Only a minority of law graduates will choose to deepen their basic knowledge of public international law through research and practical experience at a later point. Thus, the fact that international law does not figure more prominently in legal briefs and domestic court rulings should not come as a surprise. If higher education institutions – and those training and testing future advocates – put greater emphasis on international law, the domestic practice pertaining to international law can only stand to gain in richness and depth.

Of course, and as I will emphasize (*infra*, 2.2), initiatives are also needed at the international level to strengthen domestic courts' expertise on international law.

2008 DETEC, decision of 25 April 2017, available at <ainees-climat.ch/documents>. The DETEC found that the authorities' alleged failure to take appropriate measures against climate change did not affect the appellants' rights and obligations, and that they could therefore not request a ruling on real acts as per art. 25a of the Federal Act on Administrative Procedure of 20 December 1968 (SR 172.021). The DETEC further held that the applicants did not have victim status, and that they could therefore not enjoy the protection of art. 13 ECHR.

2009 SFAC, judgment A-2992/2017 of 27 November 2018. Only paragraph 8 engages with international law, namely with art. 6(1), 13, and 34 ECHR, and not with art. 2 and 8 ECHR.

2010 The appellants' brief is available at <ainees-climat.ch/documents>.

2011 For a historical analysis of international law teaching in Switzerland, see Andreas R Ziegler, 'Die Entwicklung der Völkerrechtslehre und -wissenschaft in der Schweiz: Eine Übersicht' (2016) 26 Swiss Review of International and European Law 1.

2.1.2 Addressing Institutional Obstacles

Several more profound reforms can help support the legality and quality of Swiss rulings pertaining to international law. Indeed, various features of the Swiss legal order (*supra*, Chapter 3) constrain Swiss courts' interpretative activity in a way that can be problematic from the perspective of these two vantage points.

The political affiliation of most Swiss judges (which includes an annual fee to their political party), and the fact that judges must stand for reelection, are ways to address a legitimate, deep-rooted concern of the Swiss polity to secure judges' democratic accountability. However, these constraints can be problematic from the perspective of judicial independence. Consequently, they can jeopardize the legality and quality of judicial reasoning. This difficulty with regard to judicial independence is particularly salient in international law, which is heavily politicized. In Switzerland, some political groups frequently target specific areas of international law, such as international refugee law, IHRL and the case law of the ECtHR, Swiss–EU relationships, and the relationship between domestic and international law (*supra*, Chapter 3, 3.4). While debating international law domestically is not only legitimate, but essential, the politicization of international law increases the pressure on Swiss judges. Importantly, the institutional constraints to which they are subject may negatively influence the legality and quality of their work.

Separate opinions are worth exploring for the Swiss judiciary, at least for the Swiss Federal Tribunal (*supra*, Chapter 3, 4.2.5). They foster judges' thorough, comprehensive, and transparent engagement with international legal issues, which serves both the quality and the legality of judicial decisions. Of course, judges are more likely to deliver separate opinions if the political pressures they face are acknowledged and addressed. Moreover, introducing separate opinions further increases judges' already heavy workload. Still, they can significantly improve the sharpness of the domestic case law.

Finally, Swiss courts' so-called 'pragmatic methodological pluralism' has obvious advantages: it encourages interpretative solutions that are adapted to the case at hand. Yet this methodological framework cannot gloss over the characteristics of international lawmaking, nor can it be used by courts to justify a lack of predictability, clarity, and consistency. Courts cannot apply it to international legal issues without the necessary adjustments. For instance, they must acknowledge that historical interpretation requires looking at the practice of the treaty parties, and not merely at the practice of their own State. Pragmatic methodological pluralism must remain a flexible tool, but it should not become an alibi.

2.2 *Enhancing the Accessibility of Domestic Rulings*

After having suggested ways of improving the legality and the quality of Swiss rulings (*supra*, 2.1), I now turn to more general measures that need to be taken with regard to domestic rulings, considering their place in the sources of international law.

Given that domestic judicial decisions contribute to the formation and evolution of international law, and considering that they are auxiliary means in international law (*supra*, Chapter 4, section 3), the availability of these judgments needs to be enhanced.[2012] Indeed, if domestic rulings are hard to access, they cannot (and, from a rule of law perspective, should not) contribute to the formation and evolution of international law. Nor can (and should) such rulings deploy their effects *qua* auxiliary means, by assisting interpreters in the ascertainment of international law.

Some Swiss rulings that are relevant from the perspective of international law are difficult for foreign judges and legal scholars to identify and/or read, and there are hardly any comprehensive syntheses of the Swiss case law on international law. The searchability of this case law needs to be improved. Important decisions should be broadly available (even if only in the form of a summary) and systematically included in relevant databases, such as the ILDC database and the International Law Reports.

Beyond Switzerland, and as I have previously noted (*supra*, 2.1.1), access to the case law of non-English speaking (but also non-Western) jurisdictions is still limited.[2013] As a result, and for a variety of reasons that cannot be fully unpacked here, there is an imbalanced and selective use of domestic rulings in international legal practice and scholarship. Recent research[2014] as well as the

2012 This point is in line with previous efforts to make State practice more broadly available, eg Council of Europe, Committee of Ministers, Recommendation No R (64) 10 on the Publication of Digests of State Practice in the Field of Public International Law, 6 October 1964, <www.coe.int/t/dlapil/cahdi/Source/Texts_&_Documents/Resolution_64_10_en.pdf>; Recommendation No R (97) 11 on the Amended Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law, 12 June 1997, <www.coe.int/t/dlapil/cahdi/Source/Texts_&_Documents/Recommendation_97_11_en.pdf>. See also ILC, 'Report on the Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016)' (n 904) para 54 ff; ILC Secretariat, 'Formation and Evidence of Customary International Law, Elements in the Previous Work of the International Law Commission That Could Be Particularly Relevant to the Topic' (2013) UN Doc A/CN.4/659; Forteau (n 280).

2013 TWAIL scholars have flagged that the practice of non-Western States is neglected, see eg (in the context of CIL) Chimni (n 1193) 20 ff.

2014 Roberts, *Is International Law International?* (n 9) 166–172.

ILDC casebook published in 2018[2015] confirm this anglophone (and, more generally, Western) bias. This imbalance is highly problematic from the perspective of State's equal place in the sources of international law and as international lawmakers. The practice of non-Western legal systems in particular needs to be more easily accessible to the average domestic decision-maker and scholar, eg via domestic digests on States' international legal practice.[2016] Important decisions should not merely be available in English, since many domestic judges do not routinely consult resources in this language. The domestic case law included in relevant databases needs to be regularly updated based on consistent criteria, and in a geographically balanced way. Such databases must offer a truly inclusive, representative, and reliable picture of the domestic judicial practice of international law.

Taking such measures is important because databases like ILDC and the International Law Reports are widely used by international legal scholars. While some researchers may acknowledge the potential limitations of such tools, they will, in most cases, and for lack of a better option, still choose to base their work on them.[2017] Databases should also include lower court cases. Importantly, this case law must be accessible to all, and not restricted to a narrow circle of research institutions, as is currently the case with ILDC and the International Law Reports. From the very beginning, the goal of the ILDC database has been to make relevant domestic case law 'more accessible to a larger audience'.[2018] Similar remarks apply to the International Law Reports, which are only accessible to scholars affiliated to specific research institutions, yet purport to have an unparalleled 'authoritative position in international law'.[2019]

The (undoubtedly ambitious) task of increasing the visibility of domestic case law could be entrusted to the UN's Office of Legal Affairs. This would turn

2015 The most cited jurisdictions include Canada, Germany, Italy, the United Kingdom, and the United States. See Nollkaemper and Reinisch (n 89) xiii ff.

2016 As of 1 October 2017, only 30 States were publishing such domestic digests, see ILC Secretariat, 'Identification of Customary International Law: Ways of Making the Evidence of Customary International Law More Readily Available' (n 1328) 35 para 105. The digest of the Swiss practice pertaining to international law, currently compiled by Lucius Caflisch, is published yearly in the Swiss Review of International and European Law.

2017 See eg Ryngaert and Hora Siccama (n 229) 4: 'We cannot exclude the existence of other relevant cases that have not been reported in ILDC or ILR. National reporters for these databases may be inactive, or even non-existent, as a result of which domestic cases relevant to customary international law may not have been reported. Whether ILDC or ILR suffer from reporting bias is not part of our inquiry, however'.

2018 Nollkaemper and Reinisch (n 89) iii.

2019 Cambridge Core, International Law Reports, <www.cambridge.org/core/series/international-law-reports/69C73E3843D70A8CDB15CFA24351CC27>.

such a project into a State-driven and public endeavor. A project conducted under the aegis of the UN would be able to do justice to linguistic diversity, given the linguistic resources and working languages of the organization. When pursuing such a project, the ILC Secretariat's 2019 memorandum on 'Ways and Means for Making the Evidence of Customary International Law More Readily Available'[2020] can serve as an important source of inspiration. The memorandum contains helpful remarks about the linguistic and practical obstacles to making State practice available.[2021] Another useful resource is the working paper on the same issue which Manley O Hudson submitted to the ILC in 1950 in his quality as Special Rapporteur.[2022] Close to seven decades later, the ILC Secretariat notes that this recommendation to make State practice more broadly available 'has not yet been heeded by most governments'.[2023] It is worth noting that Hudson even recommended the conclusion of a multilateral agreement 'providing for a comprehensive exchange of Government publications on questions of international law and international relations'.[2024] While both Hudson's working paper and the Secretariat's report deal with State practice in relation to CIL, many of the findings and recommendations they contain can also be applied to State practice that is relevant in the context of treaties and general principles, as well as to auxiliary means.

One risk of such measures is data overload. The Swiss Federal Tribunal, for instance, provides full electronic access to all its recent case law. Such a liberal publication policy makes it difficult to identify relevant decisions. Moreover, Manley O Hudson's statement that 'it would be a herculean task to assemble the decisions on questions of international law of the national courts of all States' holds even more true today than when he wrote it in 1950.[2025] On the other hand, it would be unfortunate to lose the complexity and richness of domestic judicial practice by including only a limited number of domestic cases in relevant databases. To handle this complexity and the amount of cases, all States should use at least roughly the same criteria of classification when they

2020 ILC Secretariat, 'Identification of Customary International Law: Ways of Making the Evidence of Customary International Law More Readily Available' (n 1328).

2021 See ibid 30 ff para 84 ff.

2022 ILC, 'Article 24 of the Statute of the International Law Commission, Working Paper by Manley O Hudson, Special Rapporteur' (1950) UN Doc A/CN.4/16 and Add. 1.

2023 ILC Secretariat, 'Identification of Customary International Law: Ways of Making the Evidence of Customary International Law More Readily Available' (n 1328) 29 para 82.

2024 ILC, 'Article 24 of the Statute of the International Law Commission, Working Paper by Manley O Hudson, Special Rapporteur' (n 2022) 32 para 92.

2025 See ibid 28 para 39.

publish domestic digests on the practice of international law.[2026] Such digests are helpful to identify important new cases that need to be added to existing databases. Moreover, they facilitate the use of foreign case law by other domestic courts *qua* elements of the sources of international law and *qua* auxiliary means. The Swiss Federal Tribunal and other courts could also communicate the most relevant decisions from the perspective of international law in their annual reports or through press releases.[2027]

Another risk is that international agencies (eg the UN's Office of Legal Affairs) guide the outcome of domestic courts' reasoning about international law, instead of merely offering them methodological assistance. This influence on the result reached by judicial decisions must be avoided. In any case, such a control on interpretative outcomes is not what the present book is calling for. I have argued for a homogeneous hermeneutic framework in international law, but not for a homogeneous case law all things considered.

It goes without saying that the proposed measures cannot be implemented if States and other relevant actors do not devote enough resources to this topic. One must stress that such steps are needed if courts are to fulfill their task as legal interpreters, and if they are to offer reliable means of determination of international law that can be used by other decision-makers, instead of painting a skewed picture of international law.

Of course, whether the picture painted by a domestic court is indeed skewed is a complex question, unless the court is explicit about what it is doing. A court may be contributing to a more broadly supported evolution in the practice of international law.[2028] It may also simply be expressing reasonable disagreement with other courts, government branches, and States on a given issue. Hence, the weight given to domestic courts' interpretations must necessarily be determined in context, with regard to the specific case.

2026 Recommendation No R (97) 11 on the Amended Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law, 12 June 1997, <www.coe.int/t/dlapil/cahdi/Source/Texts_&_Documents/Recommendation_97_11_en.pdf>.

2027 Ehrenzeller (n 638) 19 f.

2028 This issue has for example been addressed by Katzenstein, 'International Adjudication and Custom Breaking by Domestic Courts' (2012) 62 Duke Law Journal 671.

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